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# Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

## Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. The report is part of the Working Group's ongoing global study of national laws and regulations relating to private military and security companies. The present report focuses on the laws and regulations of six countries of the Commonwealth of Independent States, four countries in the Asia and Pacific region and the United States of America in North America. The global study aims to assess existing national laws regarding private military and security companies and their effectiveness in protecting human rights and promoting accountability for violations. It also aims to identify any commonalities, good practices and regulatory gaps that may exist.

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# Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

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# I. Introduction

1. The present report covers the activities of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination since its previous report to the Human Rights Council (A/HRC/30/34 and Add.1). In addition, it contains the results of the Working Group's study on national legislation concerning private military and security companies in Eastern Europe, the Asia and Pacific region and North America.

2. The report is submitted pursuant to Commission on Human Rights resolution 2005/2, by which the Commission established the mandate of the Working Group, and Human Rights Council resolution 30/6, by which the Council further extended the mandate.

3. The Working Group comprises five independent experts: Patricia Arias (Chile), Elzbieta Karska (Poland), Anton Katz (South Africa), Gabor Rona (United States of America) and Saeed Mokbil (Yemen). Ms. Karska served as Chair-Rapporteur for the period January 2015 to May 2016; Ms. Arias holds the Chair until 31 October 2016.

4. For the purpose of the present report, a private military and security company is defined as "a corporate entity which provides, on a compensatory basis, military and/or security services by physical persons and/or legal entities". Military services refer to "specialized services related to military actions, including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities". Security services refer to "armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities".[1]

# II. Activities of the Working Group

## A. Twenty-fifth to twenty-seventh sessions of the Working Group

5. The Working Group held three sessions from 1 July 2015 to 31 to April 2016. During its twenty-fifth session, held in New York from 20 to 24 July 2015, it convened an expert panel on foreign fighters. It also met with United Nations officials on the adoption of some of its recommendations on the use of private military and security companies by the United Nations, with non-governmental organizations and with representatives of the private military and security industry.

6. At its twenty-sixth session, held in Geneva from 30 November to 4 December 2015, the Working Group convened an expert panel on private military and security companies, met with representatives of Member States on country visits and issues concerning the mandate as well as with a representative of the private military and security industry.

7. At its twenty-seventh session, held in Geneva from 11 to 15 April 2016, the Working Group convened an expert panel on foreign fighters and the evolution of mercenarism.

[1] Draft convention on private military and security companies (see A/HRC/15/25, annex).

## B. Communications

8. Since its previous report to the Human Rights Council, the Working Group sent communications jointly with other special procedures mandate holders to the Governments of Australia and Nauru concerning asylum seekers detained in the latter country.[2]

## C. Country visits

9. The Working Group conducted official visits to Tunisia from 1 to 8 July 2015 (A/HRC/33/43/Add.1), to Belgium from 8 to 12 October 2015 (A/HRC/33/43/Add.2), to Ukraine from 14 to 18 March 2016 (A/HRC/33/43/Add.3) and to European Union institutions from 25 to 28 April 2016 (A/HRC/33/43/Add.4).

## D. Other activities of Working Group members

10. On 3 December 2015, Ms. Karska was a panellist at a public hearing in Brussels on the use of private security companies in the context of European security and defence organized by the Subcommittee on Security and Defence of the European Parliament Committee on Foreign Affairs.

11. Ms. Arias participated in an expert consultation on enforced disappearances and non-State actors in Rabat, Morocco, on 7 February 2016, organized by the Working Group on Enforced or Involuntary Disappearances and the National Human Rights Council of Morocco. She was invited by the Office of the United Nations High Commissioner for Human Rights in Guatemala to a meeting to discuss the situation of private security companies in the country, in particular the progress of related research.

12. Mr. Mokbil represented the Working Group at the Regional Conference on Private Military and Security Companies, held in Addis Ababa from 11 to 12 November 2015, co-hosted by the Swiss Federal Department of Foreign Affairs, the International Committee of the Red Cross, Addis Ababa University and the Geneva Centre for the Democratic Control of Armed Forces. He served as a panellist on the topic "Regional and international perspectives: the African Union and the work of the United Nations".

13. Mr. Rona Served as a commentator for a discussion on the domestic side of the monopoly on the use of force at an event organized by the Friedrich Ebert Foundation in New York on 10 March.

# III. Research on national legislation concerning private military and security companies

## A. Introduction

14. The Working Group continued its global study of national laws regarding private military and security companies to assess their effectiveness in protecting human rights and promoting accountability for violations. The study aims to identify any commonalities, good practices and regulatory gaps that may exist.

[2] Summaries of the communications will be included in a report to be submitted to the Human Rights Council at its thirty-third session.

15. The present report focuses on the laws and regulations of six countries of the Commonwealth of Independent States (Azerbaijan, Kazakhstan, Kyrgyzstan, the Republic of Moldova, Tajikistan and Uzbekistan), four countries in the Asia and Pacific region (Australia, New Zealand, Nauru and Papua New Guinea) and the United States of America in North America.[3]

16. In its 2015 report to the Human Rights Council (A/HRC/30/34), the Working Group focused on the laws and regulations of eight countries in Central America and the Caribbean,[4] eight countries in South America[5] and four countries in Western Europe.[6] In its 2014 report (A/HRC/27/50), it covered eight francophone African States[7] and eight Asian States[8] while in its 2013 report (A/HRC/24/45), it focused on 13 Anglophone African States.[9]

17. The Working Group hopes that its global study will result in guidance that will help Member States to regulate the growing number of private military and security companies. The national laws on such companies were analysed in the present report on the basis of the following elements: (a) scope of the legislation; (b) licensing, authorization and registration; (c) selection and training of personnel; (d) permitted and prohibited activities; (e) rules on the acquisition of weapons; (f) use of force and firearms; (g) accountability for violations and remedies for victims; and (h) ratification of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

## B. Analysis

### 1. Commonwealth of Independent States

*Scope of the legislation*

18. All six countries in the present study have enacted criminal legislation to regulate private military activities, most commonly within their Criminal Code. Of the six countries, Azerbaijan, Kazakhstan, Kyrgyzstan and the Republic of Moldova expressly prohibit the formation and use of mercenaries. The term "mercenary" is not employed under the law in Tajikistan, but the prohibition on the "organization of an illegal armed formation"[10] may serve a similar purpose. Uzbekistan does not have an express restriction on the formation of private military companies, but its Criminal Code restricts participation in armed conflict or military actions for the purpose of obtaining money or personal benefits.[11]

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[3] Australia and New Zealand, along with the United States of America, are members of the Western European and Others Group in the United Nations, one of the geopolitical regional groups into which United Nations Member States have unofficially divided themselves.

[4] Costa Rica, Cuba, El Salvador, Guatemala, Honduras, Mexico, Nicaragua and Panama.

[5] Argentina, Bolivia (Plurinational State of), Brazil, Chile, Colombia, Ecuador, Peru and Uruguay.

[6] France, Hungary, Switzerland and the United Kingdom of Great Britain and Northern Ireland.

[7] Burkina Faso, Cameroon, Côte d'Ivoire, Democratic Republic of the Congo, Mali, Morocco, Senegal and Tunisia.

[8] China, India, Malaysia, Pakistan, Philippines, Singapore, Sri Lanka and United Arab Emirates.

[9] Botswana, the Gambia, Ghana, Kenya, Lesotho, Mauritius, Namibia, Nigeria, Sierra Leone, South Africa, Swaziland, Uganda and Zimbabwe.

[10] Article 185 of the Criminal Code.

[11] Section 154 of the Criminal Code.

19. Almost all of the reviewed legislation includes provisions for the particular activities related to private military companies. Moreover, in the Republic of Moldova[12] and Uzbekistan,[13] the intentional killing and infliction of bodily injury for profit or mercenary motives shall be punishable by law.

20. The scope of legislation in the countries reviewed generally covers only private security companies, although in Kazakhstan, the legislation covers both private and public security organizations. Under the law in Azerbaijan, certain public places (e.g., the National Bank, various administrative sites and oil and gas export infrastructure) may be protected only by State security services, not private security companies.[14] In Tajikistan, there do not appear to be any specific laws on private security companies. In Uzbekistan, the laws on private security companies have undergone dramatic changes since the adoption of a decree on 24 January 2014,[15] which prohibited non-governmental organizations and individuals from engaging in security activities.

*Licensing, authorization and registration*

21. Apart from Tajikistan and Uzbekistan, all the other countries have provided for a regulatory framework for the licensing and registration of private security services. In Azerbaijan, a licence is required to provide private security services[16] while a licence can be obtained for providing both private security services and private detective services in Kazakhstan[17] and the Republic of Moldova.[18] Laws in both Azerbaijan and the Republic of Moldova stipulate that foreign security organizations are not allowed to conduct operations within their territories; with amendments to the law on terrorism, Azerbaijan has further toughened the penalties on involvement in foreign mercenary activities.

22. In Kyrgyzstan, under the current law private organizations intending to carry out the security functions listed in the law must be established especially for that purpose.[19] The Ministry of Internal Affairs is proposing to introduce an amendment to the law which imposes stricter requirements, including provisions prohibiting those without experience in law enforcement and relevant training, as well as persons who have been convicted of crimes, suffer from mental illness and/or are addicted to alcohol or drugs, from working as private guards and requiring those responsible for such groups to have higher education. However, the amendment also proposes to replace the licensing regime with a registration procedure.

23. While most of the reviewed countries have regulatory guidelines, gaps in implementation and enforcement have been identified. These include the lack of a clear and publicly accountable body dedicated to licensing, a mechanism for monitoring the post-licensing activities of private security companies and a national registration system for such companies. The Working Group is of the view that a standard set of human rights-based criteria for licensing, a national registration system and a single expert body dedicated to licensing and monitoring the activities of private security companies are desirable to exert effective control over this industry.

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[12] Articles 151 and 152 of the Criminal Code.
[13] Chapters 1 and 2 of section one of the Criminal Code.
[14] Decree of the Cabinet of Ministers No. 32 of 7 February 2008.
[15] Regulation of the Cabinet of Ministers No. 16 of 24 January 2014.
[16] Article 17 of Law No. 266-IIIG.
[17] Article 5 of Law No. 85-II; Law No. 202-V of 16 May 2014; Government Decree No. 1421; Government Decree No. 909.
[18] Article 5 of Law No. 283-XV; articles 8 (19) and 13 (1) of Law No. 451.
[19] Article 14 of Law No. 35.

*Selection and training of personnel*

24. Except for Tajikistan and Uzbekistan, all the other countries have established eligibility criteria for the recruitment of private security guards.[20] A clean criminal record is standard, but some countries permit convictions for less serious crimes. For example, the laws of Kazakhstan and Kyrgyzstan bar individuals with a prior criminal record, while in Azerbaijan, only individuals with a past felony conviction are disqualified. The provisions also vary in relation to the age requirement: individuals must be at least 18 years old to qualify as a security guard in Kyrgyzstan and the Republic of Moldova while the minimum age requirements are 19 and 20, respectively, in Kazakhstan and Azerbaijan. Kyrgyzstan also excludes individuals with incapacity due to a physical or mental disability, while Azerbaijan requires Azerbaijani citizenship as well as medical evidence of the absence of psychiatric disorders.

25. Azerbaijan, Kazakhstan, Kyrgyzstan and the Republic of Moldova also provide information on the qualifications and training requirements for private security guards.[21] A special training or preparatory course is required in all four countries. In addition, Azerbaijan requires the completion of mandatory military service while in Kyrgyzstan, the training can be waived with three years of experience in law enforcement.

26. In Azerbaijan, the training course must be organized by State education centres, while in Kazakhstan and Kyrgyzstan, the training can be carried out by specialized non-State educational or training centres that have been approved and licensed by the Government. In the Republic of Moldova, certified educational institutions can conduct the qualification courses but training, retraining and accreditation must be obtained from the Ministry of Internal Affairs.

27. The analysis shows that while most countries have established a framework for the vetting and training of private security company personnel, training on human rights is not provided. The Working Group urges the mandatory inclusion of human rights in the training curricula to build awareness and respect for international standards as well as to minimize the risk of violations.

*Permitted and prohibited activities*

28. Among the six reviewed countries, only the legislation of Azerbaijan and Kazakhstan provide guidelines on the types of services private security companies are permitted to provide. The laws of Kazakhstan contain general and broad provisions[22] while those of Azerbaijan list the permitted services in detail.[23]

29. Regarding prohibited activities, all the reviewed laws apart from those of Tajikistan and Uzbekistan contain restrictions on private security companies. The laws of Azerbaijan, Kyrgyzstan and the Republic of Moldova focus on the protection and privacy of persons. The laws of Azerbaijan and Kyrgyzstan require private security companies to cooperate fully with the State and they may not "withhold information on committed or planned crimes from law enforcement authorities".

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[20] Azerbaijan: Law No. 266-IIG; Kazakhstan: Government Decree No. 1421; Kyrgyzstan: article 14-2 of Law No. 35; Republic of Moldova: Law No. 283-XV.

[21] Azerbaijan: Law No. 266-IIG; Kazakhstan: Government Decree No. 1126; Kyrgyzstan: Law No. 35; Republic of Moldova: article 24 of Law No. 283-XV and Government Regulation No. 667 of 8 July 2005.

[22] Article 4 of Law No. 85-II.

[23] Article 5 of Law No. 266-IIG.

30. The ambiguity concerning which activities are permitted, the difference in scope of prohibited activities and the lack of a clear dividing line between the functions of private security companies and law enforcement authorities increase the risks of ineffective control of private security company activities and potential abuse by those companies. This situation gives rise to challenges of enforcement and accountability and, in turn, to the protection of fundamental human rights and the availability of remedies for violations. It is therefore essential to enact more specific legislation regarding the role and functions of private security companies and to prohibit the involvement of company personnel in combat or military activities in order to ensure compliance with international human rights law.

*Rules on the acquisition of weapons*

31. Legislation in Azerbaijan, Kazakhstan, Kyrgyzstan and the Republic of Moldova contain provisions for the use of weapons by private security organizations. The legislation of all four countries includes a list of devices approved by the Government, including protective and technical equipment and lethal and non-lethal weapons. In Azerbaijan, the regulations cover both the supply of and the demand for weapons.[24]

32. In Kazakhstan, Kyrgyzstan and the Republic of Moldova, legislation stipulates licensing and registration procedures for the use of weapons by private security companies. In Kazakhstan, acquisition of "service weapons" is subject to a licence issued by the Ministry of the Interior.[25] In Kyrgyzstan, private security organizations or security and investigative departments of private enterprises may also acquire firearms subject to a licence issued by internal affairs authorities; the firearms thus acquired must be registered with the internal affairs authorities within two weeks of their purchase.[26] In the Republic of Moldova, the permits to use weapons are issued by the Ministry of Internal Affairs or local police authorities.[27] The Ministry conducts regular recertification of security personnel to determine their aptitude to use force and should such recertification fail, the Ministry may withdraw its permission and forbid the individuals in question from using force and related devices.[28]

33. On the other hand, legislation in Tajikistan and Uzbekistan contains only general provisions regarding the use of weapons. The Criminal Codes of Tajikistan and Uzbekistan both restrict activities such as the illegal production, repair, purchase, sale, carrying, keeping and transportation of weapons without due authorization;[29] the Criminal Code of Uzbekistan further specifies the types of weapons, including firearms, ammunition, explosive substances and explosive assemblies.[30]

34. There are elements of good practice in some of the laws, for example, the regulation covering both the supply of and demand for weapons in Azerbaijan, the safety standard requirements on private security company operations in Kazakhstan and the monitoring and recertification process in the Republic of Moldova. All these could be applicable in other States, and it is desirable to create a consistent and comprehensive control mechanism throughout the region. Finally, the national legislation of only two countries contains

[24] Article 7 of Law No. 422-IG of 30 December 1997.

[25] Articles 6 and 10 of Law No. 339-I of 30 December 1998; Government Decree No. 1176 of 3 August 2000.

[26] Articles 14 and 17 of Law No. 49 of 9 June 1999 (as amended); in accordance with Law No. 12 of 3 March 1997; Law No. 35; Regulation No. 532; schedules to Regulation No. 532 of 20 August 2003.

[27] Article 32 of Law No. 283-XV.

[28] Articles 31 and 32 of Law No. 130 of 8 June 2012; Schedule 4 to Regulation No. 667.

[29] Articles 195 and 196 of the Criminal Code.

[30] Article 248 of the Criminal Code.

provisions which restrict the use of weapons and impose legal consequences for their violation. It is desirable that all countries develop legal and criminal restraints on private security company personnel so as to ensure better compliance with standards under international human rights law.

*Use of force and firearms*

35. Only three of the six countries have enacted legislation restricting the use of force by private security personnel: Azerbaijan, Kyrgyzstan and the Republic of Moldova. The law in Azerbaijan contains general provisions concerning private security companies, whereby "special equipment", that is certain kinds of weapons and protective equipment, may be used only in "extreme circumstances".[31]

36. The laws of Kyrgyzstan and the Republic of Moldova specify the circumstances under which the use of firearms or special devices is justified: firearms may be used in defence against an impending attack that threatens human life or health, against a group attack or armed assault against protected property, to restrain individuals showing armed resistance, or to fire a warning shot in the air. Special equipment may be used only to repel immediate attacks, to restrain an offender attempting to flee from a crime scene, or when "non-violent preventive actions did not result in the desired outcome". The legislation includes procedures and mandatory actions to be taken before and after the use of force. The law of Kyrgyzstan requires every instance of firearm use to be reported immediately to local internal affairs authorities. Law in the Republic of Moldova includes further provisions: the security or law enforcement agents must issue a prior warning of the intention to use force.

37. That only three of the six analysed legal regimes contain provisions regarding the use of force by private security company personnel demonstrates that the law in this region is quite undeveloped. To protect fundamental human rights, notably the right to life and the right to security, there must be a clear distinction between the activities of private security companies and State authorities and a prohibition on the involvement of private security company personnel in combat and military activities. Legislation should also provide for any differences in what is permitted during peacetime and in the course of armed conflict as well as regulation of the involvement of foreign personnel in private security companies or in the participation of those companies in operations abroad. Finally, the provisions regarding the right to self-defence and the conditions under which the use of force is justified should be further elaborated so as to ensure that the use of force is mandated, proportional and restricted to what is necessary, in accordance with international law.

*Accountability for violations and remedies for victims*

38. Research reveals that in all six reviewed countries there is a government department with similar functions that is responsible for regulating the activities of private security companies; this is essentially the Ministry of Internal Affairs. In some countries, the ministries work in cooperation with another State body: the Prosecutor's Office in Kazakhstan, the Chamber of Licensing in the Republic of Moldova, the National Guard in Tajikistan and the First Deputy Prime Minister in Uzbekistan.

39. However, only four of the six countries have enacted legislation providing for regulatory measures. The laws in Kazakhstan and Tajikistan contain general provisions, stating that the regulatory bodies would conduct "surveillance"[32] and "operational-

[31] Articles 14 and 15 of Law No. 226-IIG; Regulation of the Cabinet of Ministers No. 127 of 13 August 2007 (as amended).

[32] Articles 1 (2) and 22 of Law No. 85-II; articles 1 (75-1) and (75-3) of Law No. 377-IV.

investigative activities",[33] respectively. In Kyrgyzstan and the Republic of Moldova, the legislation specifies that the regulatory bodies are entitled to perform "scheduled and unscheduled inspections" to determine compliance with licensing terms and other applicable regulation.[34]

40. All the analysed laws also contain criminal offences relating to mercenary activities. These are found in the Criminal Codes of Azerbaijan,[35] Kazakhstan,[36] Kyrgyzstan,[37] the Republic of Moldova,[38] Tajikistan[39] and Uzbekistan[40] (see Schedule 2). The sanctions mainly take the form of imprisonment (up to life imprisonment, or even a death sentence in extreme situations), but the laws vary in the types of "indirect" mercenary activities which they criminalize. Firstly, in all countries except Uzbekistan, the creation, financing or use of mercenary groups in armed conflicts entails imprisonment for between 4 and 12 years. Participation in mercenary activities carries a slightly lighter sentence of imprisonment for between 3 and 10 years, except in Tajikistan where participation in mercenary activities in an armed conflict carries the harsh sentence of 12 to 20 years' imprisonment. In three of the six countries — Kazakhstan, Kyrgyzstan and Tajikistan — the involvement in mercenary activities entailing the abuse of official powers the recruitment of young people constitute separate offences and carry a sentence of 7 to 15 years' imprisonment in all three countries.

41. Finally, three countries — Kazakhstan, the Republic of Moldova and Uzbekistan — also criminalize mercenary activities corresponding to the harm they cause. The laws provide different prison terms depending on the degree of injury to the victims, that is the infliction of bodily harm, serious harm, or intentional killing "for mercenary motives. In Kazakhstan, some mercenary activities are capital crimes.

42. In addition to the criminal offences described above, the legislation in some countries also has administrative and international elements. In Kazakhstan, violation of the procedural requirements and restrictions on private security organizations constitutes an administrative offence.[41] As for the international law elements, mercenary activity is regarded as a war crime in Azerbaijan and in Tajikistan, the intentional use of force aimed at non-combatants or that which results in murder, inhuman treatment or grave suffering in the course of an internal or international armed conflict is regarded as an intentional violation of international humanitarian law. Both are directly punishable under the Criminal Codes of these countries.[42]

43. While there is a designated body for regulating private security company activities in all the reviewed countries, the analysis reveals a lack of specific rules on the content of monitoring mechanisms, which might result in weak enforcement in practice. Most of the legislation contains similar provisions in relation to the type and nature of the criminal offences related to mercenary activity. Given the transnational nature of private military and security company activities, the Working Group is of the view that the further standardization of accountability mechanisms is desirable, so as to ensure accountability of private military and security companies regardless of the location of their operations. The general lack of legal and practical remedies for victims should also be addressed.

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[33] Law No. 45 of 12 April 1994.
[34] Kyrgyzstan: articles 3 and 6 of Law No. 35; Republic of Moldova: article 31 of Law No. 283-XV.
[35] Article 114 of the Criminal Code.
[36] Articles 170 and 267 of the Criminal Code.
[37] Articles 229 and 375 of the Criminal Code.
[38] Articles 141, 151 and 152 of the Criminal Code.
[39] Articles 185, 195, 196 and 401 of the Criminal Code.
[40] Articles 97, 104, 105 (chapter 1 of section one) and 154 of the Criminal Code.
[41] Article 470 of the Administrative Offences Code of Kazakhstan; Law No. 85-II.
[42] Article 114 of the Criminal Code of Azerbaijan; article 403 of the Criminal Code of Tajikistan.

*Ratification of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries*

44. Three of the six reviewed States are parties to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries: Azerbaijan, the Republic of Moldova and Uzbekistan. Azerbaijan ratified the Convention on 4 December 1997, while the accession of the Republic of Moldova and Uzbekistan took place on 28 February 2006 and 19 January 2008, respectively.

45. Although Tajikistan is not a signatory to the Convention, it is a criminal offence in Tajikistan to intentionally violate international humanitarian law.[43]

46. While some of the countries explicitly prohibit mercenary activities and have enacted criminal legislation regarding private military companies, there is very little reference to the international standards in any of the legislation reviewed. This raises concerns as to the commitment of those States to observe those standards. The Working Group urges all States parties to incorporate the standards contained in the Convention into their national legislation and encourages non-signatories to become parties, with a view to enhancing accountability mechanisms for the fuller safeguard of human rights.

## 2. Asia and Pacific region and North America

47. The countries in these regions analysed for the study are Australia, Nauru, New Zealand, Papua New Guinea and the United States of America.

*Scope of legislation*

48. The laws of all five countries cover private security companies and their activities. Generally, there is no separate legislation concerning private military companies and related services. Rather, the laws cover a variety of private security activities, from the protection and patrolling of sites to the protection and guarding of persons, though the range of activities differs.

*Licensing, authorization and registration*

49. In the United States, the primary entities in charge of coordinating the activities related to the licensing and registration of private military and security companies at the federal level are the Department of State and the Department of Defense.[44] Individual states may, however, adopt their own laws pertaining to registers and licensing.

50. In Australia, licensing is controlled by either the state or territory police, though the Australian Security Industry Association regulates private security activities. The Australian licensing authority is responsible for issuing and renewing security licences, monitoring the licence holders and keeping the register of licences.

51. In Papua New Guinea, the Security Industries Authority issues licences to security firms and grants permits to security officers and security guards.[45] Nauru, through the licensing authority, which is appointed by the Cabinet,[46] must also keep a register of all security licences granted.[47]

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[43] Article 40 of the Criminal Code.

[44] National Defense Authorization Act, Public Law 110-181.

[45] Security (Protection) Industry Act 2004, section 5 (1) (a).

[46] Private Security Act 2012, section 10.

[47] Ibid., section 31.

52. In New Zealand, the licences are provided by the Private Security Personnel Licensing Authority (part of the Ministry of Justice).[48] Every applicant must publish a notice of the intention to make an application, and the Authority will notify the police of every application for a licence or certificate.[49] In addition, the Authority must notify the Commissioner of Police in writing when a license/certificate is issued.[50] The Authority must hold a register of licensees and a register of certificate holders.[51]

*Selection and training of personnel*

53. The United States Congress established a legislative framework in the National Defense Authorization Act requiring the Department of Defense, in coordination with the Department of State, to be in charge of the licensing of private military and security companies and to prescribe regulations on the selection, training, equipping and conduct of personnel performing private security functions in an area of combat operations.[52] With regard to the training of the personnel, the geographic combatant commanders are in charge of verifying that private security company personnel meet all the legal, training and qualification requirements.[53] Contractors authorized to accompany forces are required to receive training regarding their status under international humanitarian law.[54] At the direction of Congress, the Department of Defense supported the development of a business and management standard,[55] now an international standard (ISO 18788) for private security companies, known as PSC-1, which includes training and accountability measures. Companies must implement the standard in order to compete for contracts.[56] Australia and New Zealand have also recognized and supported ISO 18788.

54. In the various state and territorial laws in Australia, a distinction is made between a licence to employ security employees and a licence to carry out a security activity. There are typically various categories of licence, depending on the kind of security activity the holder of the licence is authorized to carry out.[57] The licensing authority will grant the licence if it is satisfied that the applicant is a fit and proper person and has the competencies and experiences required. For that purpose, the applicant must have successfully completed an approved training.

[48] Private Security Personnel and Private Investigators Act 2010, section 87.

[49] Ibid., sections 27 and 48.

[50] Ibid., sections 33 and 53.

[51] Ibid., section 97.

[52] Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Public Law 111-383; National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84; Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417; National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181. It should be noted that the National Defense Authorization Act is not a permanent piece of legislation; it is passed on an annual basis and can therefore change from year to year.

[53] Department of Defense Instruction No. 3020.50 of 22 July 2009, Procedures, part 1, section (a) (2).

[54] Department of Defense Instruction No. 3020.41 of 20 December 2011, enclosure 2 (3) (f).

[55] American National Standards Institute, Management system for quality of private security company operations-requirements with guidance, ANSI/ASIS PSC.1-2012.

[56] Office of the Assistant Secretary of Defense for Logistics and Materiel Readiness, Private security companies.

[57] For example, the Security Industry Act in the Australian Capital Territory creates five types of licence and establishes a register of those persons granted a licence, while the Act in New South Wales creates three types of licence.

55. In Papua New Guinea, any person who wishes to carry out security services must apply for a licence with the Security Industries Authority, which may issue three types of licence for security service providers.[58] A licence holder can then employ security officers or security guards, who must hold a permit that enables the licence holder to employ security officers or security guards in accordance with what is specified in the permit.[59] The Authority may grant a licence only if the applicant possesses the capabilities and experience required for the particular class of licence applied for, and if the applicant (or its director, secretary or chief executive officer in the case of a corporate body) is a fit and proper person.[60] The Authority is also entrusted by the relevant law with the mission to fix minimum standards of training and discipline governing the holders of a licence or permit and to formulate a code of conduct governing disciplinary matters.[61] The research did not reveal any code of conduct or regulation for training in Papua New Guinea.

56. In Nauru, the licensing authority will issue a licence if it is satisfied that the applicant is an adult and a suitable person.[62] In deciding upon the suitability of the applicant, the authority will consider the applicant's (or its director's executive officer's) character, financial position and any other matter prescribed by regulation.[63] The applicant must not have had a licence cancelled within the 12 months before the application is made and the applicant must not have contravened the Act within five years before the application is made.[64]

57. In New Zealand, the relevant law requires that security personnel be suitably qualified and that they not behave in ways that are contrary to the public interest.[65] The licencing authority may grant the licence/certificate only if the applicant is of or above the age of 18 years, there is no ground for disqualification and if the authority is satisfied that the applicant is suitable to carry on the class of business for which he/she has applied.

58. The licensing regime in New Zealand screens out unsuitable people, such as those with serious criminal convictions, and allows training requirements to be imposed. In October 2013, training regulations for private security personnel came into force in New Zealand and training is compulsory for both licence and certificate holders working as crowd controllers, property guards and personal guards.[66]

*Permitted and prohibited activities*

59. The United States limits outsourcing of "inherently governmental functions". Federal law[67] and policy[68] define the scope of those functions that only governmental personnel, and not contract employees, may perform. Inherently governmental functions

[58] Security (Protection) Industry Act 2004, section 40.
[59] Ibid., section 26.
[60] Ibid., sections 43, 44 and 45.
[61] Ibid., section 5.
[62] Private Security Act 2012, section 13.
[63] Ibid., sections 14, 15 and 16.
[64] Ibid.
[65] Private Security Personnel and Private Investigators Act 2010, section 3.
[66] Ibid., section 114.
[67] Federal Activities Inventory Reform Act of 1998, Public Law 105-270 and Federal Acquisition Regulation of 2005.
[68] Office of Management and Budget Circular A-76 and Office of Federal Procurement Policy, policy letter 11-01.

were originally defined as activities that "are so intimately related to the public interest as to require performance by Federal Government employees".[69]

60. Subsequent regulations and guidance documents[70] incorporate this language and further elaborate on the use of the term. For example, in its policy letter 11-01 the Office of Federal Procurement Policy establishes two tests for identifying inherently governmental functions: (a) the nature of the function, i.e., the exercise of sovereign powers of the United States that are governmental by their very nature, for example, arresting a person; and (b) the exercise of discretion.[71] According to the policy letter, inherently governmental functions involve, for example, the interpretation and execution of the laws of the United States so as "to significantly affect the life, liberty, or property of private persons".[72] The policy letter provides a detailed list of examples of such functions.[73] The list includes combat,[74] security operations performed in direct support of combat as part of a larger integrated armed force,[75] security operations performed in environments where, in the judgment of the responsible federal official, there is significant potential for the security operations to evolve into combat[76] and security that entails augmenting or reinforcing others (whether private security contractors, civilians or military units) that have become engaged in combat.[77]

61. According to both the federal law and the policy regulation, contractors providing special non-law enforcement security activities that do not directly involve criminal investigations, such as prisoner detention[78] and gathering information for or providing advice, opinions, recommendations or ideas to federal government officials[79] are not inherently government functions. Department of Defense Instruction No. 3020.41 states that contracted services may be utilized in applicable contingency operations for all functions not inherently governmental;[80] that inherently governmental functions and duties are barred from private sector performance;[81] and that contractors authorized to accompany the force can be utilized in such operations in a non-combat role.[82]

62. The United States Government appears to draw a line between permitted and prohibited activities of private military and security companies with reference to combat and combat-related activities, but does not specifically address "high-risk activities", which would include quite a number of functions even outside combat. Additionally, there is no clear enforcement mechanism for ensuring that agencies comply with the policy guidance on "inherently governmental functions", which is particularly worrying considering the dramatic expansion of the government contractor industry and the massive increase in the role and involvement of contractors in intelligence analysis and targeting decisions.

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[69] Federal Activities Inventory Reform Act of 1998, section 5.2 and Office of Management and Budget Circular A-76, Inventory process, B (1) (a).

[70] Federal Acquisition Regulation and Office of Federal Procurement Policy, policy letter 11-01.

[71] Office of Federal Procurement Policy, policy letter 11-01, section 5-1 (a) (1) (i) and (ii).

[72] Ibid., section 3, Definitions, (a) (3).

[73] Ibid., appendix A.

[74] Ibid., appendix A (4).

[75] Ibid., appendix A (5) (a).

[76] Ibid., appendix A (5) (b).

[77] Ibid., appendix A (5) (c).

[78] Federal Acquisition Regulation, section (d) (19) and Office of Federal Procurement Policy, policy letter 11-01, appendix B (9).

[79] Office of Federal Procurement Policy, policy letter 11-01, section 3 (b) (1).

[80] Department of Defense Instruction No. 3020.41, enclosure 2, section (1) (a) (1).

[81] Ibid., section (2) (e).

[82] Ibid.

63. The assumption that private military and security company contractors do not carry out inherently government functions relating to combat or direct participation in hostilities is further supported by the legislation, which notes that contractor personnel accompanying the United States armed forces or and in a designated operational area or supporting a diplomatic or consular mission outside the United States, are civilians.[83] At the same time, United States legislation also stipulates that contractors authorized to accompany the force, if captured during international armed conflict, are entitled to prisoner of war status.[84]

64. In Australia, it is usually prohibited, among other things, to employ security persons without a proper licence, to carry out a security activity without a proper licence, or if the licence has been suspended or revoked, to contravene any condition of a licence, to advertise security activities without being the holder of a licence, to abuse the authority conferred by the licence and to refuse to produce the licence to a police officer or any person with whom the licensee has dealings when carrying out security activity.[85]

65. In some cases, the research found references in the Australian legislation to the involvement of law enforcement personnel in private military and security company-related activities. For example, in the Australian Capital Territory, Commonwealth officers, such as members of the defence force and protective service officers, are not bound by the Security Industry Act.[86] Also, in New South Wales, the provisions of the law do not apply to members of the "armed forces" of the Commonwealth, another state or a territory.[87]

66. In Papua New Guinea, it is prohibited for a person to operate or receive security services without a licence, employ a person without a permit or provide false or misleading information in an application for a licence or permit.[88] Further, if the holder is convicted of an offence punishable by a term of imprisonment of two years or longer and, as a result of the conviction, is sentenced to death or imprisonment, or if he/she is found guilty on a complaint for which the penalty of cancellation of a licence is recommended by the Board of Complaints, the licencing authority can cancel the licence.[89] The relevant act includes no provisions on the participation of law enforcement agents in the activities of private security companies.

67. In Nauru, it is a criminal offence under the law to conduct a security activity without a security licence, to operate a security firm and employ persons who do not hold a security licence, to fail to comply with a condition of a security licence, to fail to produce a licence when asked to do so by a police officer, and to fail to inform the licensing authority of any change of detail in the licence or application.[90] Further, a public officer cannot carry out the duties of a security officer, bodyguard or crowd controller or perform security firm-related activities.[91]

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[83] Code of Federal Regulations, title 48, chapter 2, section 252.225-7040 (2011 edition), Contractor personnel authorized to accompany United States armed forces deployed outside the United States, section (b) (3) and Federal Acquisition Regulation 52.225-19, Contractor personnel in a designated operational area or supporting a diplomatic or consular mission outside the United States, section (b) (iii).

[84] Department of Defense Instruction No. 3020.41, enclosure 2, section (1) (a) (1.

[85] Pursuant to section 10 of the Australian Capital Territory Security Industry Act 2003 and section 29B of the New South Wales Security Industry Act 1997.

[86] Security Industry Regulation 2003, Part 2 of section 6.

[87] Security Industry Act, section 6 (2).

[88] Security (Protection) Industry Act 2004, sections 50, 51 and 52.

[89] Ibid., section 46.

[90] Private Security Act 2012, sections 24-29.

[91] Ibid., section 5.

68. In New Zealand, any person who conducts a private security business without a licence is subject to a fine.[92] The relevant act provides for specific responsibilities of licensees and certificate holders, including the requirement to wear an identification badge, the obligation to keep records, to allow access to those records by the police and the Complaint, Investigation and Prosecution Unit and to inform the licensing authority of any change to the licence/certificate holder's name or residential address and of any ground for disqualification subsequent to the application. Failure to comply with any of these obligations would constitute a criminal offence.[93]

*Rules on the acquisition of weapons*

69. In the United States, the Arms Export Control Act governs the export and import of specific defence-related articles and services, including private security company services,[94] while the International Traffic in Arms Regulation requires that private military and security companies that do business abroad and that wish to ship and use certain weapons, protective equipment or electronics in connection with their business obtain export licences. In Australia, a range of laws ensure the implementation of the respective arms-related international treaties;[95] these are further complemented by the Export Control Act 1982, which imposes strict requirements on companies and individuals wishing to export weapons. Finally, the Weapons of Mass Destruction (Prevention and Proliferation) Act 1995 requires a specific ministerial permit for the export of any goods or services to another country.

*Use of force and firearms*

70. In the United States, with respect to situations in which force can be used, "contractor personnel shall not be authorized to possess or carry firearms or ammunition during applicable contingency operations,"[96] except for cases "where the civil authority is either insufficient or illegitimate, and the commander determines it is in the interests of the Government to provide security, because the contractor cannot obtain effective private security services; such services are unavailable at a reasonable cost; or threat conditions necessitate security through military means".[97]

71. United States law also specifies that contractor personnel accompanying the United States armed forces or/and in a designated operational area or supporting a diplomatic or consular mission outside the United States are authorized to use deadly force only in self-defence[98] and when such force reasonably appears necessary to execute their security mission to protect assets/persons.[99] In addition, Department of Defense personnel shall use only the amount of force reasonably necessary to carry out their duties;[100] force must be reasonable in intensity, duration and magnitude;[101] and deadly force is justified only under

[92] Private Security Personnel and Private Investigators Act 2010, section 23.
[93] Ibid., Part 3, sections 65-71.
[94] Arms Export Control Act, section 2778.
[95] Crimes (Biological Weapons) Act 197; Nuclear Non-Proliferation (Safeguards) Act 1987; Chemical Weapons (Prohibition) Act 1994.
[96] Department of Defense Instruction 3020.41, enclosure 2, section 3 (k).
[97] Ibid., section 4 (e).
[98] Code of Federal Regulations, title 48, chapter 2, section 252.225-7040 (2011 edition), section (b) (3) (i); Federal Acquisition Regulation 52.225-19, section (b) (ii) (B) (3) (i).
[99] Code of Federal Regulations, title 48, chapter 2, section 252.225-7040, section (b) (3) (ii); Federal Acquisition Regulation 52.225-19, section (b) (ii) (B) (3) (ii).
[100] Department of Defense Directive No. 5210.56 of 1 April 2011, enclosure 2, section 2 (a).
[101] Ibid., section (2) (b).

conditions of necessity and may be used only when lesser means cannot be reasonably employed or have failed and the risk of death or serious bodily harm to innocent persons is not increased by its use.[102]

72. As for control over the use of force, United States regulations require an evaluation of the necessity to arm personnel with consideration being given to the possible consequences of accidental or indiscriminate use of those arms.[103] Another regulation provides that while Department of Defense civilian personnel engaged in security and law and order activities shall be appropriately armed and have the inherent right to self-defence,[104] arming Department of Defense personnel with firearms shall be limited and controlled and shall be limited to missions or threats and the immediate need to protect Department of Defense assets or persons' lives.[105]

73. With regard to further preconditions for the use force, contractor personnel can be armed for individual self-defence only on the basis of applicable United States, host nation or international law, relevant status-of-forces agreements, international agreements or other arrangements with local authorities and on a case-by-case basis[106] and if weapons familiarization, qualification and briefings regarding the rules for the use of force have been provided.[107] According to United States rules, each geographic combatant commander shall develop a system of verifying that private security company personnel meet all the legal, training and qualification requirements for authorization to carry a weapon.[108] The permission process is run by the appropriate Staff Judge Advocate on a case-by-case basis.[109]

74. Contractors designated to support a diplomatic or consular mission outside the United States are also authorized to carry weapons and have to be adequately trained to carry and use them,[110] with full understanding of, and adherence to, the rules for the use of force issued by the Combatant Commander or the Chief of Mission,[111] in compliance with applicable agency policies, agreements, rules and regulations and other applicable law.[112] In cases where all private security companies need to be armed, the relevant rules set out very detailed procedures and documentation on individual training, covering weapons familiarization and qualification; rules for the use of force; limits on the use of force, including whether defence of others is consistent with host nation status-of-forces agreements or local law; the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of force that control the use of weapons by civilians; and the Law of Armed Conflict.[113]

75. In addition, personnel authorized to be armed shall be thoroughly briefed on their individual responsibilities and shall receive mandatory training.[114] Moreover, security, law enforcement or other designated personnel who routinely engage in duties or activities are required to attend a complete Department of Defense component-approved training every

[102] Ibid., section (4) (b).
[103] Ibid.
[104] Ibid., section 4 (a).
[105] Ibid., section 4 (b).
[106] Department of Defense Instruction 3020.41, 4 (e) (2) (a).
[107] Ibid., 4 (e) (2) (b).
[108] Department of Defense Instruction 3020.50, enclosure 3, Part 1 (a) (2).
[109] Ibid., enclosure 3, Part 1 (a) (3).
[110] Federal Acquisition Regulation 52.225-19 (h) (3) (i).
[111] Ibid., (h) (3) (i) (B).
[112] Ibid., (h) (3) (i) (C).
[113] Department of Defense Instruction 3020.50, enclosure 3, section 1 (a) (2) and (3) (d).
[114] Ibid., enclosure 2, section 1 (b) (2).

12 months, including firearms familiarization, live-fire qualification and use-of-force training. The legislation also notes that the inappropriate use of force could subject contractors to United States and local host nation prosecution and civil liability.[115] For example, unless immune from host nation jurisdiction by virtue of an international agreement or international law, inappropriate use of force by contractor personnel authorized to accompany the United States armed forces can subject such personnel to United States or host nation prosecution and civil liability.[116]

76. In Australia, all state and territorial police departments maintain registries of firearm ownership within their respective jurisdictions,[117] and states and territories have introduced restrictions on firearms and firearms storage requirements. For example, New South Wales, South Australia, Tasmania and Western Australia allow the holder of a specific category of licence to carry firearms, but only if the licensee is duly authorized under the applicable firearms legislation.[118]

77. In Papua New Guinea, the licensing authority determines whether circumstances justify carrying or using a firearm. The holder of a class A security operators licence or a security officer may apply to the Registrar for the issue of a firearm licence. Except for this specific provision, the relevant act[119] expressly provides that a licence for a firearm shall not be issued to any person licensed under the act.[120]

## C. Accountability and remedies

78. In the United States, the Military Extraterritorial Jurisdiction Act extends federal criminal jurisdiction to certain defence contractor personnel and to contractors hired by other agencies that support the Department of Defense in connection with criminal offences committed outside United States territory.[121] If a contractor in a designated operational area, or supporting a diplomatic or consular mission, is involved in conduct outside the United States that would constitute an offence punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, while employed by or accompanying the armed forces, he/she may be subject to the criminal jurisdiction of the United States.[122] The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense to arrest any such person outside the United States.[123] However, this provision leaves a significant gap in extraterritorial criminal jurisdiction because it does not cover all contractors working for other agencies, such as the Department of State.

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[115] Department of Defense Directive No. 5210.56, section 4 (e) (2) (c).

[116] Code of Federal Regulations, title 48, chapter 2, section 252.225-7040 (2011 edition), section (b) (3) (iii).

[117] Tim McCormack, *PRIV-WAR Report – Australia: Australian Report on National Legislation and Judicial Practice*, 2009, p. 7.

[118] See, for New South Wales, Firearms Act No. 23 of 1996, sections 16C and 48; for South Australia, Firearms Act 1977, sections 10-12; for Tasmania, Firearms Act No. 23 1996, sections 18 (c), 33, 37, 85 and 86; and for Western Australia, Firearms Act 1973, section 16A.

[119] Security (Protection) Industry Act 2004.

[120] Ibid., section 71.

[121] Military Extraterritorial Act, United States Code, title 18, sections 3261-3267.

[122] Military Extraterritorial Jurisdiction Act, United States Code, title 18, sections 3261 ff; Code of Federal Regulations, title 48, chapter 2, section 252.225-7040 (2011 edition), section (e) (vii) (B) (2) (i).

[123] Military Extraterritorial Act, United States Code, title 18, section 3262.

79. Federal criminal jurisdiction also extends to conduct that is determined to constitute a war crime when committed anywhere in the world, by or against a United States national or a member of the United States armed forces.[124] It also applies to the offences of recruitment or use of child soldiers, genocide, homicide, torture or trafficking in persons committed by a national of the United States within the special maritime and territorial jurisdiction of the United States.[125]

80. The Uniform Code of Military Justice was also amended to expand the United States military's authority to prosecute crimes committed by civilians serving with or accompanying the armed forces to include civilians serving in a "contingency operation".[126] It should be noted, however, that the constitutionality of this provision has not been fully tested, as the United States Supreme Court has in the past expressed significant concerns about trying civilians in military courts.[127]

81. In Australia, the legislation on criminal accountability pertains in certain limited circumstances to private military companies by extending the application of Australian criminal law to civilians (whether they are Australian nationals or residents or not) accompanying the Australian forces abroad, or to Australian nationals or residents engaged by an Australian governmental agency to undertake tasks in countries outside Australia. For example, the Defence Force Discipline Act 1982, which provides in principle the legal framework for the Australian military, establishes a process for the extension of the Australian criminal law to civilians, including private contractors that accompany the armed forces on missions abroad.

82. Under the Australian law, contractors of the Department of Defence can be considered "defence civilians"; their criminal acts committed abroad are covered by the extraterritorially applicable Australian criminal law and they can be prosecuted for such acts by Australian courts.[128] As a result of the amendment to the Crimes (Overseas) Act 1964, even criminal acts committed on mission by private security or military contractors hired by government agencies other than the Department of Defence are covered by Australian criminal law.[129] The Crimes (Overseas) Act covers bodies corporate as well as individuals, which means that an Australian private military or security company carrying out activities in a foreign country could be subject to criminal prosecution.

83. The Working Group believes that private military and security companies contracted by the Government of Australia should be held accountable for human rights violations, even if they occur outside Australian territory. The Australian legislation on civil liability for the activities of private military companies and private security companies and/or the actions of their personnel is minimal. Australian contract law may well apply extraterritorially in the sense that parties can enter into a binding contract in Australia for services provided overseas, and any alleged breach of the contract can be litigated in Australian courts. However, tortious liability in Australia does not extend extraterritorially in the absence of a specific legislative provision to that effect.[130]

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[124] War Crimes Act, United States Code, title 18, section 2441.

[125] United States Code, title 18, sections 1091, 1111, 2340-2340B and 2442; Code of Federal Regulations, title 48, chapter 1 (2000 edition), sections 22-1700-22.1704.

[126] Uniform Code of Military Justice, United States Code, title 10, sections 801-946.

[127] See, e.g., *Toth v. Quarles* (1955).

[128] Defence Force Discipline Act 1982, sections 9 and 61.

[129] Crimes (Overseas) Act 1964, section 3.

[130] McCormack, *PRIV-WAR Report – Australia*, p. 14.

84. In New Zealand, the licensing authority is also in charge of the discipline of the licensees and certificate holders. A complaint can be filed with the authority against a licensee or a certificate holder, on at least one ground for disqualification or cancellation. This may apply if the licensee or certificate holder has contravened any provision of the relevant act or regulations, or if he/she has been guilty of misconduct or gross negligence, if a false statement was made in the application or if he/she has failed to meet one of the responsibilities stipulated in the act.[131]

85. The authority will consider the complaint and, if it decides to investigate, may refer the complaint to the police or to the Complaints, Investigation and Prosecution Unit.[132] The authority may take interim action and suspend a licence or certificate if this is in the interest of the public and if further loss or damages may be caused if the licence/certificate is not suspended.[133] A disciplinary hearing will be held and, if the authority is satisfied that the grounds of the complaint have been proved, it may cancel the licence or take other measures that it deems appropriate, such as suspending the licence, requiring training, stipulating additional conditions for the licence, levying a fine or issuing a reprimand.[134] The licence or certificate may be cancelled by the authority on mandatory grounds, if at any time a ground for disqualification applies or if the licence was issued by mistake or by reason of fraud on the part of the applicant,[135] or on discretionary grounds.[136]

86. In Papua New Guinea, the relevant law also provides for a Board of Complaints, which shall inquire into any complaints against a licensee.[137] The act also provides for disciplinary actions against a licensee for improper conduct, which may be initiated by the authority itself or any other person and will be decided upon by the Board.[138] The Board may impose penalties, such as a reprimand, the suspension or cancellation of the licence or the permit, or attributing disciplinary points against the licensee.[139]

87. The legislation of Nauru contains no provisions with regard to accountability and reporting; the only criminal offences are those that the law relates to the conduct of security activity without a licence or those not in compliance with the licence.[140]

*Ratification of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries*

88. Australia, Nauru, Papua New Guinea and the United States have not ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. New Zealand and Australia are the only countries that have enacted national laws relating to mercenary activities. With the exception of Papua New Guinea and the United States, all other States have ratified Protocol I Additional to the Geneva Conventions of 12 August 1949.

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[131] Private Security Personnel and Private Investigators Act 2010, sections 73 and 74.
[132] Ibid., section 75.
[133] Ibid., section 76.
[134] Ibid., section 78.
[135] Ibid., sections 79 and 82.
[136] Ibid., sections 80 and 83.
[137] Security (Protection) Industry Act 2004, sections 57 ff.
[138] Ibid., sections 53 ff.
[139] Ibid., section 61.
[140] Private Security Act 2012, sections 24-29.

# IV. Conclusions and recommendations

89. The research reveals that while each of the six countries that were part of the former Soviet Union has legislation that directly or indirectly regulates private security companies, each country approaches the regulation of those companies differently. There is a general regulatory emphasis on formal and procedural conditions, each country having a set of detailed criteria for the licensing, registration, selection and training of private security companies and their personnel; however, there is little provision for substantive requirements, with no reference to human rights or any international standards. Along with the general lack of mechanisms for the implementation and enforcement of the relevant regulations, the private security industry is in practice subject to relatively loose control.

90. The study also demonstrates that despite detailed provisions on permitted and prohibited activities, the acquisition of weapons and the use of force, the different roles and functions of private security companies and those of law enforcement authorities remain ambiguous. These regulatory gaps pose risks of violation of both national laws and international humanitarian law. In view in particular of the transnational tendencies of private security companies and the general lack of extraterritorial application of legal instruments, there is little protection of fundamental human rights such as the right to security, the right to life, the prohibition of arbitrary deprivation of liberty, the prohibition of torture and cruel, inhuman or degrading treatment and the right of victims to effective remedies.

91. Regarding the accountability of private military and security companies and their personnel, the analysis reveals that the reviewed legislation lacks specific rules on inspections and monitoring mechanisms, with no single publicly accountable body dedicated to the regulation and control of private military and security company activities. The different countries have slightly varying penal systems for human rights violations by private military and security company personnel, but there is a general lack of remedies for the victims of such violations. The standardization of accountability and enforcement mechanisms can create a comprehensive network of accountability throughout the region, ensuring compliance with international human rights law and international humanitarian law.

92. Concerning the review of Australia, Nauru, New Zealand, Papua New Guinea and the United States of America, the study reveals that each country approaches the privatization of the security industry differently, creating regulatory gaps in some respects. The analysed countries focus on the protection provided to persons and goods in the domestic sphere and the majority of the countries do not specifically address private military companies, the issue of military and security services provided abroad or the extraterritorial applicability of the legislation. Only two out of the five countries prohibit mercenarism in their national legislation.

93. In general, the five countries have detailed regulations on licensing and authorization of private security services as well as on the selection criteria for the personnel, but fewer rules could be found on the content of the training of private military and security company staff. The analysis shows that only one of the five countries analysed has legislation that includes some reference to international humanitarian law in the selection criteria or in the training materials.

94. Further, none of the countries has specific rules on the direct participation of private military and security companies in hostilities, while only one defines and lists "inherently government functions" which are strictly reserved for government personnel and cannot be exercised by private security or military contractors.

Additionally, few States make even limited references to the involvement of law enforcement agents in the activities of private military and security companies and very few references were found to specific rules on the export of weapons and firearms by company personnel. The use of force is regulated in detail by only one of the countries reviewed.

95. The Working Group notes that while some of the reviewed countries have demonstrated commitment to the international legal instruments related to mercenaries, the research reveals very limited reference to international standards in their domestic laws. The Working Group calls on those countries that are parties to the international instruments on mercenaries to incorporate the international standards into national legislation and to introduce relevant enforcement and accountability mechanisms. The Working Group also encourages signatory countries to ratify, and the remaining States to become parties, to the relevant instruments.

96. The Working Group reiterates its view that a comprehensive, legally binding international regulatory instrument is the best way to ensure consistent regulation worldwide and adequate protection of the human rights of all affected by the activities of private military and security companies. An international convention would provide a standard regulatory framework for various essential issues related to the activities of private military and security companies and a single dedicated body would ensure the accountability of these companies' personnel in guaranteeing the right to effective remedies of all victims worldwide.

97. The Working Group also encourages Governments in the various regions it has reviewed to promote discussion on the role of private security companies in the context of regional security, as part of the agendas of intergovernmental, regional and subregional organizations.

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**Human Rights Council**
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**Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development**

# Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to Tunisia

## Note by the Secretariat

The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination visited Tunisia from 1 to 8 July 2015 at the invitation of the Government. Pursuant to Human Rights Council resolution 30/6 and General Assembly resolution 70/42, the Working Group is mandated to monitor mercenaries and mercenary-related activities in all their forms and manifestations globally. In 2014, it decided to explore the growing phenomenon of foreign fighters in order to assess any possible linkages with mercenarism and the impact on human rights and the right of peoples to self-determination. The Working Group conducted a year-long study on foreign fighters in view of its report submitted to the General Assembly in 2015 (A/70/330). The mission to Tunisia was undertaken as part of the efforts to gather country-specific information for its second report for the Assembly, in 2016.

The Tunisian revolution in 2011 ended decades of authoritarian rule. The post-revolution period has, however, been fraught with challenges, including divisions between secularists and Islamists, violent demonstrations and protests, and reported assassinations of political leaders and terrorist attacks, that have destabilized the country. The Working Group took note of the widespread impact of radicalization and terrorist attacks perpetrated in the country. Radicalization has not only influenced events in Tunisia, but has also resulted in a growing number of Tunisians travelling abroad to join in combat forces, such as in the Syrian conflict. By the beginning of 2015, the total number of foreign fighters in Iraq and the Syrian Arab Republic were estimated to be in excess of 20,000, with Tunisia having one of the largest numbers of its citizens represented among them. Most fighters have reportedly joined *takfiri* or other extremist groups, such as Islamic State in Iraq and the Levant (ISIL).

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The negative impact and complexities of the foreign fighter phenomenon in Tunisia call for efforts that must be global, holistic, multi-dimensional and strategic. To better understand this phenomenon, the Working Group examined the issues of motivation, methods of recruitment and the human rights impact of these actors. It recommends a national strategic plan to respond to the diverse profiles and recruitment methods documented, to secure immediate, medium- and long-term impact, to balance punitive measures against social ones, and to ensure the comprehensive adoption of human rights standards in all its elements. It emphasizes the importance of a coordinated effort for de-radicalization and addressing motivational factors. A strong economy and job growth, with initiatives invest in youth employment in particular, are the pillars of any approach. The Working Group also urges full compliance of the new law on counter-terrorism with the State's obligations under international law and the Constitution of Tunisia. The Working Group also shared good practices from its global research on the overall theme of foreign fighters.

# Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to Tunisia*

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* Circulated in the language of submission and French only.

# I. Introduction

1. The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination visited Tunisia from 1 to 8 July 2015, at the invitation of the Government. The visiting delegation comprised the Chair-Rapporteur of the Working Group, staff members from the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Geneva, and interpreters.

2. The Working Group thanks the Government of Tunisia for its cooperation and openness, and for facilitating the mission during Ramadan and in the aftermath of the terrorist attack in Sousse, perpetrated only a few days before the visit. The delegation also thanks the staff of OHCHR in Tunisia for the support and assistance provided during the mission.

3. Pursuant to Commission on Human Rights resolution 2005/2, Human Rights resolution 30/6 and General Assembly resolution 70/142, the Working Group is mandated to monitor mercenaries and mercenary-related activities in all their forms and manifestations globally. The mandate includes the monitoring of the activities of private companies offering military assistance, consulting and security services on the international market, and their effects on the enjoyment of human rights, particularly the right to self-determination.

4. In 2014, the Working Group decided to explore the growing phenomenon of foreign fighters in order to assess any possible linkages with mercenarism and the impact on human rights and the right of peoples to self-determination. It conducted a year-long study, which included a number of expert meetings and panel events, and extensive research on the subject of foreign fighters in order to prepare its report submitted to the General Assembly in 2015 (A/70/330). The mission to Tunisia was undertaken as part of efforts to gather concrete information for its report.

5. During its visit, the Working Group held meetings in Tunis and Monastir, and in the prison of Mornaguia. The delegation was able to meet with various representatives from the executive, legislative and judicial branches of the State. In particular, it met with senior officials from the Ministry of Foreign Affairs; the Ministry of Justice, and magistrates and State prosecutors; the Ministry of Defence; the Ministry of the Interior; the Ministry of Women, Children and Family; and Members of Parliament, including the Chair of the parliamentary Commission on Rights, Freedoms and External Relations.

6. The delegation also met with representatives of civil society organizations, academics, relatives of foreign fighters or persons who have travelled to join conflicts abroad and returnees. Meetings were also held with representatives of the United Nations and other international organizations in the country.

# II. Background and context of the mission

7. The Tunisian "revolution" in 2011 ended decades of authoritarian rule under the regimes of Habib Bourghiba and Zine el Abidine Ben Ali. It was the first of a series of uprising in the region, sometimes referred to as the "Arab spring", which also led to the outbreak of the Syrian crisis in 2011. The Tunisian revolution was the culmination of years of repression, social unrest and dissatisfaction with the country's poor economic situation, high unemployment, corruption, widespread poverty and increasing economic disparities among the regions in the country.

8. Several months after the revolution, Tunisia held its first democratic elections in October 2011, the majority of votes going to the Tunisian Islamic party, Ennahda. A

coalition (or troika) was formed with two other parties, the Democratic Forum for Labour and Liberties and Congrès pour la République. During the elections, an interim president was elected by the National Constituent Assembly in accordance with the constitutional law on the provisional organization of powers and public authorities. At the end of 2014, elections based on universal suffrage saw Beji Caid Essebsi become the first President of Tunisia under its new Constitution.

9. Although years of dictatorial rule had come to an end and Tunisians welcomed a new era of democracy, the post-revolution period has been fraught with divisions between secularists and Islamists, and racked by violent demonstrations and protests, reported assassinations of political leaders,[1] and terrorist attacks, which have destabilized the country. The Working Group draws attention in particular to the increasing number of radicalized individuals and the rise of violent extremism since the "revolution", often associated with hard-line Salafists, such as the Ansar al-Sharia in Tunisia (AST). Violent extremists have been reportedly linked to the assassination of two prominent opposition politicians in 2013, clashes with law enforcement authorities resulting in multiple deaths, and the terrorist attack in March 2015 in the Bardo museum, which claimed more than 20 lives.

10. A few days before the Working Group conducted its mission, more than 30 tourists were shot and killed in Sousse. Islamic State in Iraq and the Levant (ISIL) claimed responsibility for the attacks in both Bardo and Sousse. During the mission of the Working Group, a state of emergency was declared in the aftermath of the Sousse attack. A state of emergency was also declared in November 2015, after the explosion of a bus resulted in the death of members of the Presidential Guard. Again, ISIL claimed responsibility for the attack.

11. The Working Group noted the widespread impact of radicalization not only in the local attacks in Tunisia but also in the growing number of individuals travelling to fight crises abroad, such as in the Syrian Arab Republic. One of the aims of mission of the Working Group was to understand the motivation of these individuals and the methods of recruitment used, and the human rights impact of this phenomenon.

12. A common factor in the phenomenon of foreign fighters is the radicalization that an individual often undergoes, leading to a decision to commit a terrorist act or to engage in a conflict abroad.

13. In the present report, the Working Group focuses on the form of radicalization that refuses to accept the legitimacy of State institutions and embraces recourse to armed conflict to achieve its aims. In Tunisia, salafists and salafi jihadists are often referred to as AST, whose members have been implicated in political violence and attacks since 2011. During the mission by the Working Group, the term "salafists" was consistently used to refer to those who had been radicalized in their use of violence. The Working Group noted, however, that not all salafi jihadists embraced the use of violence. The previous regime of Ben Ali exerted tight control over religious activities and actors for 23 years. During that time, Tunisian society did not have the religious space for individuals to be able to practice freely and to live by their religious convictions. Mosques were heavily controlled, and religious garb was not encouraged. Some of Tunisians most renowned experts on religion were imprisoned or exiled. Other religious actors, including prominent preachers of salafi jihadism, were subject to similar treatment. The intimidation and direct targeting of salafists

[1] According to the information received by the Working Group during its mission, two prominent opposition leaders were assassinated before the elections, during the rule of the troika. See Amnesty International, Tunisia 2015/2016, Annual Report, and Human Rights Watch, "Tunisia: Investigate Assassination of Opposition Figure", 6 February 2013.

reportedly drove them underground, to continue spreading their ideas in clandestine settings. Given that many such individuals were imprisoned by the Ben Ali regime, prison also became a place of radicalization.

14. One of the first initiatives of the Government after the revolution was the enactment of an order to release more than 500 political prisoners held by the previous regime, and the granting of 8,700 amnesties. Amnesty was granted to persons such as those convicted of violation of the international security of the State (see A/HRC/WG.6/13/TUN/1, paras. 23-30)[2] and persons deemed to belong to the political opposition.

15. The Working Group was informed that some of those released from prison were radical salafists who had become active in converting individuals to violent extremism, to the extent of becoming a serious threat to national security. The persistence of socioeconomic problems, which constituted a major reason for the revolution, together with other social challenges, provided fertile ground for radicalization. Many young and disenfranchised individuals felt alienated under the former regime and were angry at or frustrated with the Government and what they saw as a failure of the State to address their concerns. Some were then drawn to extremist propaganda. With access to the Internet and social media now widespread, the number of young people joining extremist groups and travelling to conflict zones, such as in the Syrian Arab Republic, rose. Radicalization was not only easier but also swifter. The Working Group was informed that radicalizing an individual used to take years; today, in Tunisia, it can take just a few weeks.

16. The Working Group learned that, after the revolution, mosques began to proliferate, and at least 400 of them were under the control of extremists. Groups such as AST reportedly began to disseminate its propaganda by targeting individuals in mosques that were not legally registered, usually located in impoverished or marginalized communities, where school drop-out rates and unemployment are high. In such an environment, frustration and a sense of vulnerability were reportedly manipulated to develop hatred of established systems and support for the establishment of an Islamic State. In addition, groups acting in the guise of charitable organizations were allegedly targeting and converting individuals.

17. In some cases, imams who were not part of the AST network were forced out of their mosques and replaced by members of the group. The Working Group was informed that some people had stopped frequenting their local mosque owing to the extremist views of certain imams. Such venues have, however, become strategic in attracting potential followers given their success in doing so and the difficulty of closing them down, especially those in remote areas. Radicalization has therefore proved more effective outside of the capital and in towns located in the interior of the country.

18. The Working Group also learned of the existence of Koranic nurseries for children and associations for the education of school drop-outs, the curricula of which were in breach of regulations, including seditious discourse. While many have been closed by the Government, some may continue to operate underground or privately.

19. In February 2012, a meeting of the Friends of Syria held in Tunisia was reportedly used to galvanize support to overthrow the Assad regime. The Working Group was informed that the meeting gave greater legitimacy to some jihadists (such as AST), and that networks such as AST had in fact since been dismantled, and that some members had reportedly gone to Libya, while others had been arrested.

[2] The amnesty reportedly also applied to persons convicted in the high-profile "Soliman" case.

20. In the above context, the phenomenon of foreign fighters in Tunisia is rapidly increasing and is today one of the most challenging issues faced by the new Government.

## III. Definition and scope

21. The Working Group uses the term "foreign fighters" to refer to individuals who leave their country of origin or habitual residence and become involved in violence as part of an insurgency or non-State armed group in an armed conflict. Foreign fighters are motivated by a range of factors, notably ideology or religious convictions; however, like mercenaries, a foreign fighter may also be drawn to a conflict abroad by the promise of financial gain or reward.

22. Unlike the term "mercenary", which is clearly defined in international law, there is no internationally agreed legal definition of foreign fighter or a specific regime governing them. Foreign fighters are, however, obliged to respect applicable rules of international humanitarian law during armed conflicts. In non-international armed conflicts, non-State armed groups, including foreign fighters, do not enjoy combatant immunity and may be prosecuted under domestic law simply for their participation in hostilities (see A/70/330).

23. The phenomenon of foreign fighters is not new in Tunisia. Tunisians have been known to join conflicts in Afghanistan, Iraq, Chechnya and Bosnia and Herzegovina. What is new, however, is the scope of the phenomenon, both in Tunisia and worldwide. It was estimated that, at the beginning of 2015, the total number of foreign fighters in Iraq and the Syrian Arab Republic exceeded 20,000.[3] Tunisian citizens accounting for one of the largest groups. The Working Group received information according to which there were some 4,000 Tunisians in the Syrian Arab Republic, 1,000 to1,500 in Libya, 200 in Iraq, 60 in Mali and 50 in Yemen. Some 625 have returned from conflict zones and are being prosecuted. Most fighters have reportedly joined *takfiri* or other extremist groups, such as ISIL.

24. The large number of foreign fighters from Tunisia reflects the ongoing radicalization in the country and the susceptibility of individuals, particularly young persons, to violent extremist propaganda. During its visit, the Working Group was also repeatedly informed that, after the revolution, the political situation was unstable, and that, during the rule of the troika, there was little robust or effective control over the activities of extremist groups. Radicalization was therefore left to escalate and fighters were free to leave the country to join the conflict in the Syrian Arab Republic or in Iraq.

## IV. International and domestic law

25. Tunisia is not a party to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. The State does not have a specific legal definition of the term "mercenary". It is, however, a party to Protocol I to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, article 47 of which does provide a definition. The State has not established a legal definition of the term "foreign fighter".[4]

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[3] Peter R. Neumann, "Foreign fighter total in Syria/Iraq now exceeds 20,000; surpasses Afghanistan conflict in the 1980s", ICSR, 26 January 2015.

[4] Article 3 of the new Counter-terrorism Law (2015) does, however, cover organized groups, such as a structured group of three or more persons formed for some time and acting in concert with the aim of

26. The Working Group reiterates that international human rights law continues to apply during situations of armed conflict. Foreign fighters, like any other member of State armed forces or non-State armed groups, are also at a minimum bound by peremptory norms of international law, including the prohibitions on the arbitrary deprivation of life, genocide, slavery, racial discrimination, torture and other cruel, inhuman or degrading treatment, the taking of hostages, imposing collective punishment and the arbitrary deprivation of liberty. When committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, acts such as murder, torture, rape and other forms of sexual violence, or enforced disappearance, constitute a crime against humanity (A/HRC/28/28, para. 41). Furthermore, non-State armed groups that exercise effective control over territory, such as ISIL, are increasingly considered to be bound by international human rights obligations in relation to all people within that territory (see A/HRC/10/22, para. 22, A/HRC/15/48, paras. 19-22, A/HRC/17/44, para. 72 and A/HRC/21/50, para. 10).[5]

27. During armed conflicts, foreign fighters, like any other member of non-State armed groups party to the conflict, are obliged to respect applicable rules of international humanitarian law, in particular the minimum standards enshrined in article 3 common to the four Geneva Conventions of 1949 concerning the treatment and protection of civilians, including the prohibition of murder, torture and taking of hostages. Customary international humanitarian law requires all parties to a conflict to respect the principle of distinction and proportionality in their military operations, and prohibits attacks the primary purpose of which is to spread terror.

28. Acts designated as "terrorist" in peacetime are prohibited by international humanitarian law if committed in armed conflict, including executions of civilians and persons no longer participating in hostilities, hostage-taking, and direct and deliberate attacks against civilians and civilian objects. Simple direct participation in hostilities is, however, not prohibited, nor is it a war crime.

29. Under domestic law, armed opposition fighters could always be prosecuted for mere participation in hostilities, including as an act of terrorism. Nevertheless, international humanitarian law recommends amnesties for mere participation in hostilities. Serious violations of humanitarian law, including acts of terrorism, may amount to war crimes, triggering individual criminal responsibility. Tunisian nationals found culpable of these acts may thus be found criminally responsible on an individual basis.

30. The conflicts in States affected by foreign fighters have caused large movements of refugees, including from the Syrian Arab Republic, Iraq and Libya. States must ensure that measures taken to prevent the entry or transit of suspected foreign fighters do not violate their obligations under international refugee law, in particular the prohibition of non-refoulement.

31. In Tunisia, in 2003, a law on terrorism was enacted to address terrorist attacks instigated in the country by violent extremists. The law was reportedly used to crack down on hundreds of individuals who posed a threat to the Ben Ali regime. Tunisian nationals could also be incriminated for belonging to terrorist groups outside the country, or for receiving training outside. Prior to the revolution, 3,000 people were thought to have been imprisoned under the anti-terrorism law for fighting outside Tunisia. During its visit, the Working Group was informed that a further 1,200 people had been reportedly arrested for

committing terrorist offences on national territory or abroad. Issues concerning transnational crime are also covered under article 3.

[5] See also the report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011, para. 188.

terrorist-related acts after the revolution. National law does not cover accountability with regard to the use of social media.

32. The new Constitution, adopted in 2014, recognizes Islam as the official religion of the State, although it also protects the freedom of belief. In addition, it provides for various human rights safeguards, and paved the way for elections to be held later in 2014. Decree No. 2011-88 was also used to suspend organizations reportedly set up with the intention of financing terrorist activities. The Working Group was informed that law No. 26-2015 on terrorism and money laundering was adopted by Parliament on 24 July 2015, and came into force on 7 August (see also paras. 65-71 below).

## V. Motivational factors

33. The motivation behind those who decide to join extremist groups abroad is one of particular interest to the Working Group. In Tunisia, the delegation repeatedly heard that the motivational factors responsible for the large number of Tunisian fighters active abroad were both complex and varied, including religious and political ideologies, financial gain, improved economic and social conditions, sense of purpose and sense of belonging, besides *jihad*.

34. Given the multifaceted and complex nature of motivation, there is no typical profile for a Tunisian foreign fighter. The Working Group was informed that most Tunisians travelling to join extremist groups abroad were young, usually between 18 and 35 years of age, and that the most common motivation related to ideological or religious convictions. Many of those headed to the Syrian Arab Republic and Iraq reportedly lacked a sense of purpose or identity, and had turned to extremist ideology and religion to find fulfilment and a sense of belonging.

35. The Working Group was informed that, during the radicalization process, recruiters depict the Syrian Arab Republic as the "Islamic State", affirming that sharia law will rule and that migration to the "State" was an obligation for all "good Muslims". Fighters were promised that they, as martyrs of Islam, would achieve *shahada* (martyrdom for Islam), and be welcomed to paradise.

36. The Working Group was informed that, initially, those leaving for the Syrian Arab Republic did so to assist the Syrians to fight the Assad regime, motivated by the desire to help in a situation of perceived injustice and tyranny. In some cases, fighters were reportedly incited by some Tunisian authorities. The fighters initially joined Al-Nusrah or other rebel groups (before ISIL became established), going to camps hosting wounded fighters or other victims to give them aid. What began as a perceived duty of humanitarian assistance subsequently evolved into a life spent in the battle zone without any prospect of return.

37. The deteriorating economic situation, high unemployment and other social grievances also adversely affected university graduates, now deprived of any hope for a stable career, despite their qualifications. According to the Organization for Economic Cooperation and Development (OECD), in Tunisia, a third of young people are unemployed and 62 per cent of graduates are unable to find work.[6] The resulting disillusionment and frustration has made young people more susceptible to radicalization and subsequent engagement in the Syrian Arab Republic as foreign fighters.

[6] OECD, *Investing in Youth: Tunisia, Strengthening the Employability of Youth during the Transition to a Green Economy* (OECD Publishing, Paris, 2015).

38. Many foreign fighters from a poor socioeconomic background were enticed into groups such as ISIL by the promise of financial reward, such as stipends or wages that they would be given upon their arrival in the conflict zone. The Working Group was informed that the first stage of recruitment focused on building armed forces, largely motivated by religious ideology, while the second stage focused on the recruitment of skilled persons, who were mainly motivated by large salaries and identified as supporting the development of a new "State".

39. Not all foreign fighters, however, come from a poor socioeconomic background. Some come from affluent, middle-class and well-educated families; indeed, some have a scientific or technical background, such as doctors, dentists, engineers and architects.

40. The Working Group was informed of cases of professionals offering their skills to extremist groups, such as ISIL. Some were reportedly offered jobs with a starting salary of $1,200 per month. Some were even promised as much as $10,000 per month for their professional skills, particularly in information technology. Some may also be paid a daily living allowance, while some are promised houses. Goods may also be delivered to families of foreign fighters, depending on their needs.

41. Some fighters were reportedly not paid at all. Others financed their own travel, but once in the Syrian Arab Republic they were provided with clothing, a mobile telephone and living expenses, according to need. The Working Group learned about offers of specialized training, such as the upgrading of computer skills, as a way to attract fighters. Cases of weapons and other combat training have also been reported.

42. Women, present in smaller numbers, may have also joined for similar reasons, as well as for humanitarian or private reasons, such as joining their husbands or partners. Most women reportedly travel to serve as nurses, but also to contract marriage. The Working Group was informed of one foreign fighter who allegedly married twice – once in the Syrian Arab Republic, and once in Iraq. Ever since the Government of Tunisia began to impose travel bans, however, travelling has become more difficult for women, who require written authorization. In such cases, women travel in groups to avoid detection. The Working Group was also informed of the growing number of entire families travelling to conflict zones, given that the ultimate goal is to establish a State, and family involvement was thus important. There have also been cases of fathers taking children to the Syrian Arab Republic. Other individuals have become foreign fighters, drawn by promises of a new and exciting life, or by their belief in the cause espoused by ISIL.

43. The educational background of foreign fighters is also relevant. The Working Group was informed on several occasions that individuals with a science background were more likely to be radicalized than those with a background in arts or liberal studies. There is a growing discussion on the importance of education in tackling the root causes or the motivational factors that have led people to become foreign fighters. It has also highlighted the need for counter-narratives against extremist ideologies that are rampant in the country, and the need to engage all actors in society, including teachers, religious leaders and psychologists.

44. Many of those who arrive in the Syrian Arab Republic and join the ranks of ISIL reportedly cannot return, given that any attempt to return would subject them to the risk of being killed by fellow ISIL members.

45. The Working Group was also informed of a number of people charged with the intention of going to the Syrian Arab Republic to fight. Some of these cited arrest as the reason for not leaving, while others stated that they were too scared to fight and face death, or had been discouraged by reports of armed groups turning against each other.

46. Any one or a combination of the above factors may be relevant in each case; the profiles of foreign fighters may therefore be significantly diverse. Any effort to address this phenomenon must for this reason be holistic, multifaceted and strategic.

## VI. Recruitment

47. The Working Group was informed that the recruitment of fighters in Tunisia is varied, often rapid and increasingly sophisticated. The process often involves foreign terrorist groups or individuals establishing themselves in the country. Large amounts of funding are received from outside countries, including for non-governmental associations, purportedly charitable organizations, political parties, travel, social media and families of foreign fighters. Funding is reportedly also earmarked for building mosques and recruitment venues.

48. Smuggling networks reportedly operate to take recruits across borders and sometimes through areas where trafficking in people and illicit goods may not be effectively controlled, particularly in the south, near the border with Libya. According to testimonies received by the Working Group, the routes most commonly taken to the Syrian Arab Republic is through Libya and Turkey, then over the border at Antakya. The Working Group was also informed of alternative routes through Morocco, Algeria and Serbia, countries that do not have visa requirements for Tunisians.

49. The Working Group was informed that persons who fought in the Afghanistan war and subsequently benefited from an amnesty after the revolution have used their background and experience to spread propaganda on violent extremism.

50. The Working Group heard allegations that Tunisian business persons had taken fighters to the border. After the revolution in Tunisia, a Syrian businessman was also reported to be actively recruiting in the country until information regarding his activities was made known to the authorities. Some fighters go with friends, including from the same neighbourhood; in one case, a group of four friends reportedly travelled together. Some bring over their friends once they have arrived in the Syrian Arab Republic.

51. Some fighters have been sustained financially by their families; in some cases, fighters ask their friends to collect money on their behalf from their parents and to bring it to them. Reportedly, mosques controlled by extremists would arrange for foreign fighters from the mosque to travel. The Working Group was informed of a case where, during Ramadan in 2013, caravans were organized to take as many as 100 fighters from one mosque to the Syrian Arab Republic.

52. In one village of 10,000 inhabitants, 12 young people were reported to have gone to the Syrian Arab Republic to fight. Recruiters often operate in communities without the families of potentially fighters being aware. One man informed the Working Group that his son, a university student who was financially comfortable, had told him that he was leaving to attend a conference in Libya and was subsequently located in the Syrian Arab Republic.

53. Some fighters travel abroad to fight with the consent of their parents; others are recruited by teachers. The Working Group was informed of one university teacher who radicalized students while supposedly tutoring them in mathematics. Even when the operation of these networks is reported to the authorities, arrests are often not possible owning to lack of evidence. The Working Group was however informed that, recently, more arrests are being made.

54. Young people are exposed to messages conveyed by ISIL on YouTube, Facebook and other social media, accessed in Internet cafes. The Working Group was informed that people who "like" a video on Facebook may be contacted by recruiters. Others may simply

be drawn to jihadist websites. Once recruiters have established communication, they reportedly provide users with videos and articles on extremist ideology.

55. The Working Group was informed that some potential foreign fighters show signs of their growing involvement with extremist ideology, for example by growing a beard, demanding that female family members wear a veil, forbidding the use of televisions or ignoring the advice of family members, while others show no outward sign of their radicalization.

56. When converts to the cause decide to travel, they are reportedly sent information about the trip and the route, and the persons they will need to meet. Not all information is given immediate; detailed instructions and guidance are only provided for the following stage of the journey. Direct contact may be made through telephone numbers shared on the Internet, or during face-to-face meetings with contacts made through social media.

57. Recruiters are reportedly paid by the number and qualifications of the persons that they recruit. For this reason, they apply strategies specific to the person by, for example, incentivizing them to work for the "Islamic State" or to fight, depending on the proclivities of the individual. The Working Group was informed that recruiters may be paid from $3,000 to $10,000 for each potential fighter, depending on their qualifications. Skilled recruits were sought to consolidate and be citizens of the new "State".

58. The Working Group was informed that, in Tunisia, one effect of increasing measures against travel to the Syrian Arab Republic was that many fighters join groups in Libya instead, or local terrorist groups. The period of radicalization was reported as sometimes being quite short, lasting from a few weeks to three to four months, and to no more than a year.

## VII. Human rights issues concerning foreign fighters

59. The Working Group was informed that, in conflict zones, many foreign fighters are involved in direct hostilities or combat, and have therefore been reported as perpetrators of human rights violations, such as of the rights to life and physical integrity, and torture.

60. The Working Group heard allegations of indiscriminate shelling of cities by foreign fighters. These acts may amount to gross human rights violations,[7] war crimes, and crimes against humanity or genocide. Ensuring the accountability of foreign fighters involved in such abuses and crimes is critical. Whenever possible, the State of nationality or permanent residency should investigate and prosecute fighters involved in such acts.

61. Non-State armed groups also recruit foreign fighters under the age of 18. The Working Group was informed during the mission of boys as young as 17 being recruited to fight in the Syrian Arab Republic. Human rights law prohibits the recruitment of children under 18 into State armed forces and recruitment of children under 18 years by non-State armed groups. Both the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism and the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities have reported that young boys and girls under the age of 18 are targeted to travel abroad. ISIL is reportedly using significant numbers of minors as fighters (see S/2015/123, para. 40 and S/2015/358, paras. 28 and 30).

[7] See OHCHR and the United Nations Assistance Mission for Iraq, Report on the Protection of Civilians n Armed Conflict in Iraq: 11 September – 10 December 2014, February 2015.

62. The right to self-determination is broadly understood as the right of peoples to determine their own political and economic system, including by participatory political processes. The beneficiaries of this right are the people, not the State. Given, however, that virtually all non-State armed groups describe their struggle as an effort to exercise peoples' right to self-determination, foreign fighters may be motivated to join a non-State armed group to help them to exercise that right, or to fight on behalf of armed groups claiming to assert it. They may also, however, impede the exercise of this right. Foreign fighters often have markedly different ideological and political motivations and aspirations to those of local armed groups. Their arrival may even transform the domestic secular-nationalist or democratic causes that initiated the conflict, and lead to the introduction of more radical methods of warfare. They may also prolong conflicts, complicate efforts to mediate and negotiate a political settlement, erode national and international support for the opposition, or undermine the cohesion of the armed opposition.

63. The Working Group also learned of allegations of human trafficking in camps in the Syrian Arab Republic run by foreign fighters, where people were sold or passed on to one side of the conflict or the other, for propaganda or other reasons. Children were also reportedly sold to people in other countries.

## VIII. Measures

64. The Working Group was informed by officials that, in response to the large number of Tunisian fighters engaged in the Syrian Arab Republic and Iraq and involved in terrorist attacks that have destabilized Tunisia, the Government was taking robust measures to monitor the travel of individuals to the Syrian Arab Republic and Iraq and implementing strengthened border controls. While acknowledging the legitimate need of the Government to counter terrorism and to ensure national security for its people, the Working Group also raises concerns about gaps that may lead to restrictions on fundamental human rights. During its meetings, the Working Group learned that no specific national strategy or plan of action for countering the phenomenon of foreign fighters has been prepared.

65. After the Bardo attack in March 2015, the Parliament drafted a bill focusing on countering terrorism. During its visit, the Working Group was informed that the adoption of the bill was pending and hoped that the new law would reflect comprehensive consultation with all stakeholders and the full application of international human rights standards, including with regard to excessive use of force, torture, arbitrary detention, fair trial and the right to privacy. It also hoped that the process of deliberation would not be unduly influenced, however understandably, by the pressure of public, political and international actors.

66. On 24 July 2015, the bill went before the Parliament, which adopted it as law No. 26-2015 against terrorism and money laundering, effectively superseding the law adopted under the former regime in 2003.

67. The Working Group recognizes that the new law provides for some human rights guarantees and safeguards. It has concerns, however, regarding the serious human rights implications of some provisions. For example, some are broad and ambiguous and could potentially be used to prosecute acts that are not clearly or precisely defined by law as terrorist.[8]

[8] Article 13 lists terrorist offences as including "causing harm to public or private property, vital resources or infrastructure or means of transport or communication, or computer systems or public services".

68. The new law also extends the limit of pre-charge detention to up to 15 days, during which time a suspect remains incommunicado and may not have access to family members or a lawyer, or be brought before a judicial officer. Other safeguards and guarantees for a fair trial could potentially be violated by provisions in the law that provide for closed trials, the non-disclosure of information that can be used to incriminate the accused, the use of anonymous witnesses, and excessive discretion of judges.

69. The Working Group recalls that the right to liberty and the right not to be arbitrarily deprived of liberty in international law recognize that anyone arrested or detained on criminal charges must be brought promptly before a judge or judicial officer. The Human Rights Committee, in its general comment No. 35 (2014), ruled that any delay longer than 48 hours must be exceptional and justified (CCPR/C/GC/35, para. 33).[9] The right to fair trial also includes the right to be tried by an independent and impartial tribunal; any restrictions to this right must be exceptional and comply with the principles of proportionality, necessity, non-discrimination and equality of arms, all of which should be subject to judicial review.

70. The new law also has implications for the right to privacy. Rather than placing surveillance decisions under the exclusive oversight of independent judges, it extends the power to order such measures to prosecutors. Concerns regarding the right to freedom of expression are linked also to the prohibition on "praising and glorifying terrorism", which is laid out in the law in broad terms that fail to meet the requirements set by international law.[10] In this case, a person who is found to have publicly or clearly praised a terrorist crime, their members or their activities could be sentenced up to five years of imprisonment. The Working Group is concerned that such a provision could be used to stifle or to restrict legitimate attempts by person or groups to exercise their right to free expression.

71. The Working Group also notes that an aim of the new counter-terrorism law is to align legislation with Security Council resolution 2178 (2014) in its provisions to prosecute foreign fighters. In resolution 2178 (2014), which is binding on Member States, the Council decided that Member States should, consistent with international human rights law, international refugee law and international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of foreign terrorist fighters.

72. The limitations of Security Council resolution 2178 (2014) were also acknowledged by the authorities in Tunisia. In particular, the definition of foreign fighter is deemed too vague and inadequate, a view that the Working Group shares. Indeed, persons travelling to combat areas for reasons other than terrorism, such as relatives of foreign fighters or those providing medical care, could, if the definition of the resolution is strictly applied, be incorrectly identified and prosecuted as foreign fighters.

73. The Working Group wishes to highlight the fact that, in its resolution 2178 (2014), the Security Council also recognized that addressing the threat posed by foreign terrorist fighters requires comprehensively addressing underlying factors, including by preventing radicalization to terrorism, countering violent extremism, which may be conducive to terrorism, countering incitement to terrorist acts motivated by extremism or intolerance, promoting political and religious tolerance, economic development, social cohesion and inclusiveness, ending and resolving armed conflicts, and facilitating reintegration and

[9] See also the International Covenant on Civil and Political Rights, art. 9.

[10] In its general comment No. 34, the Human Rights Committees clarifies that offences such as "encouragement of terrorism", and "extremist activity", and praising, glorifying or justifying terrorism should be clearly defined to ensure that they do not lead to an unnecessary or disproportionate interference with freedom of expression (CCPR/C/GC/34, para. 46).

rehabilitation. For this reason, the Working Group points out that any attempt to prosecute aspiring and returning foreign fighters, which could have a radicalizing effect, must be balanced with social integration and rehabilitative measures. The step taken by the Government of Tunisia on 4 July 2015 to declare a state of emergency, for a renewable period of 30 days, was one immediate measure to ensure security and greater control. Given that certain freedoms are curtailed during a state of emergency, such as on the freedom of movement, freedom of assembly and freedom of expression, and the potential application of the death penalty, the Working Group urges the authorities to implement these measures in conformity with international norms and standards.

74. The Working Group makes a similar recommendation with regard to administrative measures restricting the travel of persons under 35 years of age to certain destinations without parental approval. Such measures have an impact on the right to freedom of movement, as enshrined in article 12 of the International Covenant on Civil and Political Rights. While the right to freedom of movement is not absolute, limitations must be lawful, pursuant to a legitimate aim and necessary to achieve that aim. The same considerations must apply to measures by which travel agencies alert authorities when certain Tunisian citizens purchase an airline ticket for Turkey. It is estimated that some 9,000 people have been prevented from leaving the country pursuant to the travel ban. The Ministry of the Interior is reportedly taking measures that can result in certain individuals being deprived of their freedom of movement, without being informed and with no access to appeal.

75. The Working Group received reports during its visit that terrorist suspects had been arrested, tortured and released, which raised further questions regarding the infringement of the right to a fair trial and to freedom from arbitrary detention. The Working Group urges the Government to apply relevant national legislation and international human rights standards fully. In this regard, it welcomes the initiatives on human rights training for law enforcement officials.

76. Broadened surveillance powers may also lead to interference with the right to privacy. State authorities must ensure that surveillance measures are necessary and proportionate to the specific risk being addressed, and are accompanied by adequate procedural safeguards and effective and independent oversight.

77. The Working Group was pleased to learn of efforts by the authorities to strengthen airport and border controls, including through the detention of members of recruitment networks.

78. With regard to unregistered mosques used as radicalization centres, the Working Group learned that 80 such mosques had been closed down in the aftermath of the Sousse incident in June 2015. The Working Group urges the Government to be vigilant, and encourages it also to continue its efforts to ensure that mosques and religious centres are established in accordance with relevant laws and are not being used as radicalization centres for violent extremism.

79. The efforts of the Government to root out extremist groups operating in Tunisia are also commendable. Decree-law No. 2011-88 of December 2011 has been a useful initiative targeting extremist organizations operating in the guise of charitable organizations. Initiatives have reportedly also been taken by the Ministry of Finance to investigate the funding of non-governmental organizations. The Working Group was informed that, when an audit of an organization's financial records prove links to radical or extremist activities, the organization's accounts are frozen. A legal procedure thereafter determines whether the operations of the organization will be suspended. While the vetting of dubious organizations is important, caution should also be taken to ensure that legitimate organizations are not affected adversely by the procedure. In this context, the Working

group urges the active participation of legitimate members of civil society in a holistic approach to countering the issue of foreign fighters.

80. The Working Group was informed of similar measures taken in prisons to detain terrorist suspects separately, rather than together. The measure reportedly helped to limit the spread of terrorist doctrine in the prison, even though the risk remains.

81. The Working Group was informed that the Ministry of Women's Affairs and the Family provides families of foreign fighters with support. Psychosocial support in local communities, and education and awareness are crucial in building a sense of social cohesion and national identity among people, especially the young.

82. With regard to the prosecution of foreign fighters, the Working Group was informed that the process is often stymied by the lack of evidence, owing in particular to the transnational nature of activities. Bilateral arrangements among States are subject to claims of sovereignty, and restricted by the limited capacities of countries in conflict. The Working Group believes that a framework of international cooperation on the sharing of evidence and other relevant information among countries will be a critical step in ensuring accountability for those active in or supportive of foreign fighter networks.

83. The Working Group was informed that the Government lacks the necessary material resources, capacity, equipment and database access to upgrade and modernize its services to respond effectively to terrorist threats. Effective data management demands secure transmission. Current bilateral programmes, while useful, do not allow for a global approach. The Working Group therefore recommends that the international community support the Government in its efforts by providing it with support, technical assistance and capacity-building.

84. The Working Group also learned that, in aiming to counter the dissemination of extremist narratives on the Internet, the Government is also considering amendments to its laws on cybercrime in general. It stresses that any amendments should be in keeping with human rights standards on the freedom of expression.

85. The global economic crisis has prompted mass migration from countries in the region towards Europe. The Working Group was informed that Tunisian migrants attempting to reach Europe often take the same route as fighters heading for the Syrian Arab Republic, and may be mistaken for them, and thus be arrested and detained on suspicion of terrorist-related offences. Measures should therefore be taken to ensure that migrants are clearly identified and not taken for foreign fighters.

## IX. Returnees

86. Smugglers on the border between the Syrian Arab Republic and Turkey were reported to arrange for the entry and return of foreign fighters without them having to pass through checkpoints. The Working Group was informed that, in one case, smugglers were allegedly paid $2,000 for bringing three people back over the border.

87. Returnees are reportedly questioned at border checkpoints. The Working Group was informed that networks are becoming better structured and that fighters now take different routes to the one traditionally taken to the Syrian Arab Republic, through Libya and Turkey. Other fighters may also return by sea. Persons identified as fighters are investigated by the authorities; those found not to be fighters are released and monitored; should monitoring eventually reveal that they are actually involved in underground activities, further action is taken. The Working Group was informed that some 625 foreign fighters had returned from conflict zones and were being prosecuted.

88. Some foreign fighters reportedly return to Tunisia secretly; some even report their own death. In such cases, returnees might become a part of a sleeper cell with the aim of eventually conducting terrorist activities on behalf of extremist and *takfiri* groups based in Libya, the Syrian Arab Republic or other countries. The attacks on the Bardo museum in Tunis in March, and in Sousse in June, may have been the outcome of this type of operation.

89. There have been allegations that returnees may also enter the country through the territorial expansion of extremist groups such as ISIL, which is reported to have taken control of Sirte in Libya. From such a base, ISIL may coordinate with Tunisian terrorist returnees.

90. During its visit, the Working Group also learned of cases of returnees who, having repented of their decision to go abroad to fight, attempt to return to Tunisia. The reasons for returning may include lack of belief in ISIL ideology, disillusionment, the fragmentation of efforts caused by fighting among groups for power, injury or direct experience of the gruesome reality of combat.

91. The Working Group was informed that many returnees are traumatized and isolated, and may feel stigmatized in their communities. It was therefore pleased to learn of the efforts of authorities to consider alternatives to prosecution for returnee fighters, including social, cultural and religious approaches. In this regard, the Ministry of Women's Affairs and the Family was implementing a programme to counsel women allegedly involved in "sexual jihad", whereby they volunteer to become the comfort partners of foreign fighters abroad, and to develop a pilot prevention initiative involving counselling and coaching for families. The Ministry is also planning to conduct a strategic study and a survey to determine the impact of social issues on this phenomenon, the results of which will be compiled in a database. A programme on countering radicalization is also being prepared, in coordination with other ministries, including with a view to encouraging children to become involved in family activities rather than in those on the Internet.

92. Before the development of the above-mentioned framework, some returnees decided to return to the front to fight, given that no alternative strategy for reintegration or socio-psychological support was offered. The Working Group therefore reiterates its recommendation that the Government strive to achieve a balance between punitive and social measures, thereby addressing both the immediate and deeper structural causes of the phenomenon of foreign fighters.

93. Returnees could also be usefully provide testimony and counter-narratives to the messages of incitement disseminated by recruiters, using sophisticated communication channels and social media.

94. The Working Group was alerted to the significant shortage of funding available for the above-mentioned activities. Logistics equipment for, for example, monitoring travel was inadequate. A database of members of suspected terrorist groups has nonetheless been created, and is used to, inter alia, identify patterns of movement.

95. The Working Group was informed about the alleged imprisonment in 2012 of 43 young men from Tunisia who had reportedly been arrested at the border with the Syrian Arab Republic by Syrian authorities. Despite having been charged with trespassing, which carries a six-month sentence, and not having been convicted of any offence, they have remained in prison for more than three years. It was alleged that, in June 2013, the Syrian authorities had granted the prisoners an amnesty, but that the conditions of release had not been met by their Tunisian counterparts. Family members of those detained had approached the authorities in both the Syrian Arab Republic and Tunisia to request their release, but have been unsuccessful, despite assurances.

96. During its visit to Mornaguia prison, the Working Group learned that some 1,000 of the 6,389 inmates detained there had been charged with terrorism and were awaiting trial. Reportedly, the number has now risen to 2,000, charged under the counter-terrorism law.

97. Returnees at the prison included a number of foreigners. They included nationals of Algeria, Brazil, France, Germany, Libya and Morocco.

## X. Conclusions and recommendations

98. **In addressing the negative impact and complexities of the issue of foreign fighters, the Working Group stresses that efforts must be global, holistic, multi-dimensional, and strategic. A national strategic plan should take into account the diverse profiles of fighters and recruitment methods, be designed to have immediate, medium- and long-term impact, comprise a balance of punitive and social measures, and ensure the comprehensive adoption of human rights standards in all its elements.**

99. **Civic education is a crucial means for teaching the population the democratic values to which post-revolution Tunisia may aspire. Successfully addressing problems relating to radicalization and social unrest should be an imperative engagement not only for the State but also for all sectors of Tunisian society. Preventative measures can be implemented by supporting programmes conducted by non-governmental organizations on education, counselling, coaching, and cultural and social interaction, creating a sense of belonging, citizenship training, and by mitigating extremist reactions to perceived provocations.**

100. **In the medium to long term, a strong economy and job growth, and adequate State social services, especially in marginalized areas, would serve to fill the socioeconomic vacuum that recruiters try to manipulate. In the measures taken to strengthen the socioeconomic situation in the country, special efforts should be made to invest in the youth population – the most vulnerable to radicalization – by improving their skills and thus increasing their employment opportunities. This could include a focus on vocational training and entrepreneurship.**

101. **A coordinated effort for de-radicalization will be critical in addressing effectively the problem of foreign fighters. Counter-narratives to violent extremist propaganda should be encouraged and fostered.**

102. **In the view of the Working Group, the Government of Tunisia should open dialogue and engagement with disaffected groups and Islamic extremist advocates as a way to build mutual understanding and prevent extremist activities from going underground. This is an opportune moment for Tunisian society to develop a comprehensive strategy focusing on the political inclusion of diverse religious groups, which can advocate for tolerance and provide space for the exchange of ideas and possible solutions to important problems, such as radicalization.**

103. **With regard to legislative measures, such as the new law against terrorism and money laundering, provisions with human rights implications – including definitions of terrorism and terrorist-related crimes – should be amended to comply fully with the State's obligations under international law and the Constitution, thus ensuring that the exercise of the right to freedom of expression is not unduly restricted.**

104. **Furthermore, under the new law, any person arrested or detained on charges of terrorism should have the right to prompt access to legal counsel, including during interrogation, while family members should be notified of the arrest and obtain access to the detainee. The Working Group urges compliance with international human**

rights standards with regard to safeguarding against arbitrary deprivation of liberty and detention.

105. The Working Group cautions that oppressive anti-terrorism laws can have the effect of fuelling, rather than deterring, further radicalization. It is therefore important that a balance be achieved between punitive and social measures in countering terrorism and foreign fighters, and that opportunities for rehabilitation be ensured.

106. In the short term, improved police services and intelligence capability will allow for effective monitoring. Ongoing human rights training of law enforcement officials, combined with capacity-building by the international community, can help to ensure that practices are undertaken in keeping with international standards.

107. A holistic approach requires greater coordination across State sectors and institutions. The Working Group encourages further cooperation, as is currently being considered for ministries working on returnee programmes, and between the Ministry of Justice and the Ministry of the Interior on prison management.

108. The efforts made by civil society entities to counter hate speech in the media can serve to defuse tensions, and should be supported. Other media education initiatives, including on the use of alternative language to that of the "Islamic State", may also neutralize the sense of obligation instilled. The involvement of returnees sharing their disillusionment and insights from their experience, notably through social media and other popular forms of communication, might also act as a deterrent.

109. The Working Group was informed repeatedly that many foreign fighters undertake training in Libya before going to the Syrian Arab Republic, and that the instability in Libya has fuelled a significant degree of the support activities involved in the training and travel of foreign fighters. A resolution to the conflict and political impasse in that country would thus benefit considerably the counter-terrorism efforts of Tunisia. Every effort should be made to address, including through dialogue, what is increasingly a regional issue.

110. Given the difficulties reported in investigating and prosecuting fighters for activities committed abroad, an international framework of cooperation for sharing of evidence among participating countries would be a critical step in ensuring the accountability of those active in or supportive of foreign fighter networks.

111. During its research on the issue of foreign fighters, the Working Group received information on a number of existing rehabilitation and reintegration programmes that the Government of Tunisia may wish to consider for application to its national context. The Aarhus programme in Denmark is aimed at persuading and assisting individuals to return, while the Hayat programme in Germany focuses on deterring aspiring foreign fighters from leaving (and if they do leave, from engaging in acts of violence, and persuading them to return home in coordination with the authorities). In the United Kingdom of Great Britain and Northern Ireland, the Al-Furqan voluntary programme in prisons uses imams to challenge extreme views through Islamic teaching, while the Channel programme is a multi-agency scheme under the Home Office that works with individuals vulnerable to radicalization.

112. Ultimately, only a resolution to the conflicts raging in the Syrian Arab Republic and Iraq will bring down the demand for foreign fighters and related activities. Political commitment and efforts, including for the sustained peace and recovery of these States, and accountability and reparations for human rights violations perpetrated during the course of the conflict, are the only effective and sustainable

**way to counter the negative impact of the phenomenon of foreign fighters on human rights.**

113. **The revolution in Tunisia has been largely seen as having ushered in a new, more democratic process. The Working Group supports efforts towards the further development of a democratic culture, and thereby a more sustainable approach to the phenomenon of foreign fighters.**

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**Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development**

# Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to Belgium

## Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to Belgium from 12 to 16 October 2015. The Working Group conducted the mission as part of its year-long study on the growing phenomenon of foreign fighters. The aim of the study is to assess linkages between the foreign fighter phenomenon and mercenarism, and the impact of the foreign fighter phenomenon on human rights. The report presents the main findings of the Working Group and focuses on the definition and scope of foreign fighters in the context of the visit, as well as motivational factors, recruitment and the situation of returnees. The report also covers the measures taken by the Government to address the foreign fighter phenomenon. The Working Group provides recommendations to assist the Government in that endeavour, with particular focus on the respect, protection and fulfilment of human rights.

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# Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to Belgium*

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* Circulated in the language of submission only.

# I. Introduction

1. The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination visited Belgium at the invitation of the Government, from 12 to 16 October 2015. The delegation was composed of the Chair-Rapporteur from Poland, Elzbieta Karska, and a Working Group member from Chile, Patricia Arias, as well as staff from the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Geneva and interpreters.

2. The Working Group wishes to thank the Government of Belgium for its openness and excellent cooperation in facilitating the visit. It also thanks the staff of OHCHR in Brussels for the support and assistance they provided for the visit.

3. Pursuant to Commission on Human Rights resolution 2005/2, Human Rights Council resolution 30/6 and General Assembly resolution 70/142, the Working Group is mandated to monitor mercenaries and mercenary-related activities in all their forms and manifestations globally. The mandate also includes monitoring the activities of private companies offering military assistance, consulting and security services on the international market, and their effects on the enjoyment of human rights, particularly the right to self-determination.

4. In 2014, the Working Group decided to explore the growing phenomenon of foreign fighters, in order to assess any possible linkages with mercenarism and the impacts on human rights and the right of peoples to self-determination. The Working Group conducted a year-long study that included a series of expert meetings, panel events and extensive research on the subject of foreign fighters in order to prepare its 2015 report to the General Assembly. An official visit to Tunisia in July 2015 (see A/HRC/33/43/Add.1) and the visit to Belgium were undertaken as part of efforts to gather concrete information for the report.

5. During the visit, the delegation met with representatives from the executive, legislative and judicial branches of the State. They included the Minister of Justice, the Minister of the Interior, the Minister of Youth Aid and Houses of Justice of the French Community, the Minister for Welfare, Public Health and Family of the Flemish government, the Minister of Internal Administration, Civic Education, Housing, Equal Opportunities and the Fight against Poverty of the Flemish government, the Parliamentary Commissions on Internal Affairs and Justice, the Chief of Staff of the Minister of Defence, the federal Prosecutor and the Director for Human Rights of the Ministry of Foreign Affairs. The delegation also participated in a seminar on the prevention of radicalization organized by the federal Ministry of the Interior, which included the prevention cell of the Ministry of the Interior, coordinators working on radicalization in the Flemish and French-speaking communities and in the regions of Flanders, Wallonia and Brussels, as well as in the cities and municipalities of Brussels, Liège, Anderlecht, Antwerp and Vilvoorde.

6. The delegation also met with the Counter-Terrorism Coordinator of the European Union and the Council of Europe Parliamentary Assembly Rapporteur on Foreign Fighters in the Syrian Arab Republic, as well as civil society representatives, academics and experts on the issues of radicalization and countering violent extremism in Belgium. Meetings were also held with a convicted returnee and relatives of persons who had travelled to the conflict zone in the Syrian Arab Republic.

# II. Background and context of the visit

7. The visit of the Working Group coincided with a time of heightened concern in Belgium following a series of terrorist attacks and terrorism-related incidents. They

included the May 2014 attack at the Jewish Museum of Belgium in Brussels, the January 2015 attack on the *Charlie Hebdo* headquarters in Paris, and the January 2015 raids in Verviers. One month after the visit, on 13 November, deadly attacks took place in Paris. On 22 March 2016, further attacks were perpetrated in Brussels killing over 30 people and injuring hundreds of others. The perpetrators of most of those attacks have reportedly been linked to Islamic State in Iraq and the Levant (ISIL), and the perpetrators of the attack in Paris have reportedly been linked to Al-Qaida in the Arabian Peninsula. Belgium has thus encountered significant challenges to its national security and has had to adopt a number of counter-terrorism measures. The current context is also framed by the political circumstances particular to Belgium, where the complex State structure consists of several levels of governance: the federal State, the regions and communities, and the cities and municipalities, each having different powers and responsibilities, depending on the competence. Based on information provided by government officials, it is noted that, within the limits of their competences, communities and regions are autonomous and independent, with regard to the federal State and to each other. The communities and regions have parliaments, the members of which are directly elected, and governments, which are distinct from the federal State's legislative and executive power.

8. In accordance with article 2 of the Constitution, Belgium comprises three communities: the Flemish Community, the French Community and the German-speaking Community. "Communitization" reportedly responded to a demand for real recognition and development of a specific language and culture. In accordance with article 3 of the Constitution, Belgium comprises three regions: the Flemish Region, the Walloon Region and the Brussels Region. "Regionalization" reportedly responded to the desire for autonomy in socioeconomic fields. In territorial terms, the regions do not correspond to the three communities. Communities and regions mainly differ by dint of their different material competences.

9. Communities and regions are responsible for a defined list of competences. The Belgian legislator identified the subject matters that are allocated to communities and regions. The allocations are combined with reserves of competence for the federal State. The federal level also holds residual competence, namely competences that are not allocated to communities or regions. Unlike the federal State, which is competent for the Belgian territory, the communities and the regions only intervene in the territory of their community or region.

10. On a federal level, legislative and executive authorities are in charge of a series of competence areas relating to matters of interest that are common to all Belgians, such as defence, security, a proportion of international relations, social security and economic and monetary policy. The judicial system is also organized by the federal State. Community competencies cover cultural matters, teaching, the use of languages, health policy, family policy, policy regarding persons with disabilities, and other "customizable" matters. Regional competencies encompass regional development and town planning, environment and water policy, renovation and nature conservation, housing, agricultural, maritime and fishing policy, economy, energy policy, subordinate powers, employment policy and public works and transport.

11. It is noteworthy that, in principle, autonomy allows each region or community to exercise its competences without consulting other institutions or the federal State. However, in some cases, the Belgian legislator provides for mandatory cooperation mechanisms prior to the exercise of certain competences. The State and the federal entities may also conclude "cooperation agreements", in particular concerning the joint creation and management of common services and institutions, the combined exercise of specific competences or the development of common initiatives.

12. In the specific context of the response to the foreign fighter phenomenon, the Working Group was informed that, based on each level's specific competences, the federal level has assumed the role of instigating repressive measures, while preventive measures were allocated for action partly at the federal level, such as the BOUNCE project providing support to the families of foreign fighters, and predominantly at the level of the regions, communities, cities and municipalities, with the federal level setting up a prevention platform involving all of the above.

13. In terms of the socioeconomic factors behind the phenomenon, it is noted that most Belgian nationals and residents of non-European heritage are of lower socioeconomic status, and face particular difficulties in accessing employment. They are also more likely to have a lower level of education and experience discrimination in the workplace, even when highly educated. In addition, Belgium has to contend with a high level of youth unemployment, with 23.6 per cent of the population under age 25 unemployed.[1]

## III. Definition and scope

14. Belgian law does not recognize the concepts of "foreign fighters" or "foreign terrorist fighters". Rather, it recognizes the concept of "combatants" as defined by conventional and customary rules of international humanitarian law. In its 2015 report to the General Assembly (A/70/330), the Working Group acknowledged that there was no international legal definition of "foreign fighter" and that the term was generally understood to refer to individuals who leave their country of origin or habitual residence and become involved in violence as part of an insurgency or non-State armed group in an armed conflict.

15. In Belgium, the law of 1 August 1979 on services in an army or foreign troops on the territory of a foreign State, as amended by the Act of 22 April 2003, refers to "those in a foreign army or troop situated in the territory of a foreign state". Article 2 of the law requires the adoption of a royal decree, which has never occurred.

16. Article 140 *sexies* of the Belgian Criminal Code was introduced into the Code by the Act of 20 July 2015 to strengthen the fight against terrorism. It condemns individuals, regardless of nationality, who are leaving or entering the country in order to commit, in Belgium or abroad, a terrorist offence, as defined in that article. Convicted offenders can be punished with 5 to 10 years' imprisonment and a fine of 100 to 5,000 euros. The new law also extends to all terrorist offences the possibility of using specific search methods, and gives the judge the possibility of revoking nationality for such acts for those who have dual nationality and under a number of conditions.

17. The Working Group received information that there were some 207 Belgians in the Syrian Arab Republic, of whom 77 had died and 128 had returned. In addition, 62 Belgians had tried but failed to get to the Syrian Arab Republic or Iraq or had been brought back. It was estimated that between 5 and 10 Belgians had been in Afghanistan since 2011, and another 5 to 10 were in Somalia. Some 46 foreign fighters had been prosecuted under the Belgian Criminal Code on charges relating to terrorism in the framework of the Sharia4Belgium trial, including some who were reportedly still in Iraq and the Syrian Arab Republic. It was reported that the number of foreign fighters leaving the country was currently dwindling to an estimated five every month compared to earlier years, when there had been 12 leaving every month.

[1] See http://data.worldbank.org/indicator/SL.UEM.1524.ZS, accessed on 19 April 2016.

18. The Working Group was informed that between April and September 2015, 13 persons were en route to the Syrian Arab Republic, 16 had reportedly died there, 14 had returned to Belgium and 11 had failed in their attempts to reach the Syrian Arab Republic. Up to the time of the Working Group's visit, a total of 62 individuals had been stopped from travelling to the Syrian Arab Republic, while 412 were either in, or had been to, that country. Around 55 females were known to be in the Syrian Arab Republic.

19. The Working Group acknowledges that accurate figures are difficult to verify, and that different definitions of foreign fighters may affect related accounting.

20. The Working Group was informed that the greatest number of foreign fighters is reported to come from Brussels, the next greatest number from Antwerp, then Vilvoorde in the province of Flemish Brabant, although the number from there appears to be declining. Much smaller numbers of foreign fighters were known to have come from the provinces of Liège, Namur and East and West Flanders.

## IV. Motivational factors

21. The Working Group was informed that, while the profiles of foreign fighters were diverse, their average age was around 23 years, but was decreasing, with one case of a 13-year-old recruit. It was estimated that over 50 per cent of foreign fighters from Belgium were Belgians of Moroccan ancestry. Women were also increasingly leaving Belgium to join conflicts abroad, with most reported cases in the Syrian Arab Republic.

22. Motivations were also reported to be varied. Among the motivations identified were the need for a sense of belonging and acceptance, the search for a livelihood, escaping a criminal background, religious convictions, "humanitarian" reasons and "adventure". For some, the promise of a wife might also be an incentive. Motivations might also change over time, such as from "humanitarian" to "ideological".

23. Of specific interest to the Working Group is the question of payment. Evidence gathered during the visit indicated that some foreign fighters received a salary, and were also provided with free housing, access to swimming pools, occasional gifts or donations, and might be supported to bring over wives and children to live with them. It was also reported that some fighters received an allowance for daily living expenses in the amount of approximately 700 euros a month, and that foreign fighters received a higher salary than local Syrian fighters.

24. For operational purposes, the Ministry of Defence identifies six typical profiles of Belgian foreign terrorist fighters:

(a) The fighter who is convinced of the doctrine and ideology, has a deep understanding of Islam and is in pursuit of martyrdom;

(b) The fighter who has a shallow level of conviction and joins as part of a subculture or as part of an adventure, is concerned with superficial appearance and trappings such as a beard or an AK-47, and seeks the opportunity for marriage;

(c) The fighter who has a problematic past and has been involved in youth crime, and is seeking respect;

(d) The fighter who succumbs to peer pressure, and is rapidly and superficially radicalized;

(e) The fighter who is running from the police or debts, and is seeking power or pleasure;

(f) The fighter who is highly educated, frustrated by discrimination, wants to fight the system, and is challenged by questions of identity.

25. According to the authorities, the majority of foreign fighters have a low level of education, come from difficult family circumstances and have been involved in petty crime. In the 2012 wave of travels to the Syrian Arab Republic, many fighters were reportedly seeking to fight President Assad in the Syrian Arab Republic, and most of them joined Al-Nusrah Front. Some young people were motivated by the apparent "success" of ISIL, and joined it as the "winning" side.

26. Against that backdrop, deradicalization may be viewed as more of a societal endeavour, thus requiring issues to be addressed at a societal level, in addition to discrete programmes for specific individuals whose individualistic motivations may require a more tailor-made approach and support for their families.

27. Academics characterize the current foreign fighter phenomenon as part of a youth subculture that has developed against a very specific social and international context. Radicalization is viewed as a socialization process in which group dynamics, that is, kinship and friendship, are more important than ideology, and there is a sense of inequality and estrangement from society.[2] In the same vein, other studies depict foreign fighters as "Islamized radicals" rather than "radicalized Islamists".[3]

28. The sense of estrangement is reportedly felt more by the more dispersed community of Belgians of Moroccan descent than other migrant communities, such as Belgians of Turkish descent. The absence of a structured overall Muslim community has also been noted by observers, which includes the fact that a number of imams are not from Belgium, do not speak the local language and may not be acquainted with Belgian history and culture. There were also reports of occasional tensions between the Muslim Shiite and Sunni communities. Third-generation Muslims whose grandparents were migrants may not feel a strong sense of being rooted in society and may experience intergenerational friction. They may also not feel represented politically.

29. The ban on wearing clothing that covers the face, or a large part of it, also known as the ban on full-face veils, as well as the decision of a series of schools and administrations to ban headscarves, may also reportedly contribute to feelings of alienation among Muslims in Belgium, in addition to the concentration of Muslim and migrant communities in areas characterized by a low average income. Reportedly, those communities feel a sense of discrimination and marginalization from social, economic and political opportunities, including in the labour market, where discrimination based on descent is reportedly frequent. Young people may also identify with a sense of injustice among Muslim populations globally as a result of ongoing conflicts such as the Israeli-Palestine conflict and the purported attacks on the Syrian people by their Government.

30. The Working Group learned that more recently, the majority of foreign fighters have joined ISIL, and a smaller number Al-Nusrah Front, while a few opt for Suqur al-Sham (the Falcons of the Levant) or the Shia militia in Iraq. The Free Syrian Army reportedly remains composed almost exclusively of Syrians.

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[2] Rik Coolsaet, *What drives Europeans to Syria, and to IS? Insights from the Belgian case. Egmont Paper 75* (Gent, Egmont Royal Institute for International Relations, Academia Press, March 2015, update June 2015).

[3] Georges Allemagne and others, "Radicalisme : conséquence d'une fracture ?" (Centre d'Etudes Politiques Economiques et Sociales, Juin 2015).

## V. Recruitment

31. The departure of fighters to the Syrian Arab Republic from Belgium proceeded in waves. The first wave was characterized by association with Sharia4Belgium in 2010. From 2010 to 2011, Sharia4Belgium reportedly recruited on the streets, including through distributing flyers in Dutch, and would host "religious" meetings in Antwerp.

32. Peer recruitment was more prevalent from 2012. Young people reportedly made contact on social media or met in person, for example on the streets, in sports or music clubs and at theatre groups, sharing stories and photographs portraying life in the Syrian Arab Republic as one of freedom, camaraderie and material affluence. Since 2014, the main method of recruitment is reportedly through informal networks of friends and family, and through social media.

33. Available information indicates that a significant degree of recruitment is also undertaken through friends and family in the Syrian Arab Republic who are paid on the basis of the number of people they recruit and whether the recruits subsequently marry.

34. Many foreign fighters are reportedly radicalized through online propaganda and discussions with peers. Elements of the propaganda are reported to comprise loyalty to the group and rejection of others, notably "unbelievers", the notions that idols must be destroyed and that democracy is a man-made law followed by "infidels", and the interpretation of jihad as an offensive war.

35. The Belgian authorities reportedly monitor the social media pages of suspected or returned foreign fighters. They also remove extremist content from the Internet on the basis of judicial action, and are seeking permission to take such action on an administrative basis. Use of public social media has reportedly decreased, and more people are using closed forums. Furthermore, the use of counter-narratives may be counterproductive, as recruiters alert candidates and use it in their indoctrination, saying that it is a form of manipulation.

36. The Working Group learned that women were recruited primarily to give moral support to the fighters and for ideological reasons. Women are reportedly told that men in Europe are "infidels" who would not lead them to "paradise", but that if they marry a jihadi, they will be rewarded.

37. Recruiters facilitate the departure of recruits from Belgium by providing religious education, money, airline tickets, travel documentation, clothes and the contact details of persons to meet in the Syrian Arab Republic. Reportedly, recruiters were paid 5,000 to 7,000 euros for each recruit. The period of radicalization is reportedly becoming shorter and is currently estimated to be two or three months.

38. The Working Group was informed that often engagement with Islam has been short-term or superficial, and is less based on traditional formal instruction than self-teaching.

39. It is also reported that foreign fighters are routinely taken to the Syrian Arab Republic through Adana, then Antalya in Turkey. Turkey may be especially attractive owing to its close proximity to the Syrian Arab Republic and the availability of cheap flights. Based on bilateral cooperation, many foreign fighters are stopped and returned by the Turkish authorities.

40. With respect to the use of the Internet for radicalization, one study commissioned by the Ministry of the Interior in 2012 and published in 2014 concluded that exposure to extremist content was one of the major drivers for political and religious violence, but only for those who were either socially vulnerable or otherwise had a certain propensity to

extremism.[8] Based on quantitative and qualitative research involving 6,000 individuals, the study noted that deeper "causes of the causes" are poor social integration, perceived procedural injustice and perceived discrimination in society. While religious extremism and ideology play a role, foreign fighters are often not well schooled in religious teachings, which thus serve primarily as justifications.

41. The study posits that, up to a certain level, exposure to extremism through social media is not problematic, irrespective of the level of susceptibility and exposure, but that the threat rises exponentially after a certain point. The Working Group recommends that these and other related findings should continue to inform government policy, including on the nature and level of Internet surveillance, and particularly with respect to the protection of human rights. In that regard, the Working Group was told that a commission of three magistrates approved Internet surveillance, and it was informed about the work of the Belgian Privacy Commission. The Working Group also acknowledges the role of institutions such as Ombudspersons, with which individuals can file complaints if they think their rights are being violated.

42. The Working Group calls for special consideration to be given to ensuring freedom of expression, respect for the right to privacy and safeguarding the democratic space, while excluding hate speech from public discourse. The Working Group believes that efforts to the contrary may have the effect of furthering marginalization and radicalization, and may thus be counterproductive in addressing the phenomenon.

## VI. International law

43. The 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries was implemented in Belgium by the Act of 22 April 2003 to ensure the compliance of Belgian law with the International Convention. The Ministry of Justice reportedly considered the application of the Convention in responding to concerns about foreign fighters, but found the concept of "mercenary" inadequate, so decided not to apply it and instead amended the Criminal Code.

44. The Working Group notes with concern the apparent conflating of international humanitarian law with criminal law in the approach to addressing foreign fighters. As elaborated more fully in its 2015 report to the General Assembly, the Working Group recommends that special consideration be given to the scope of international humanitarian law, whereby mere direct participation in hostilities is not prohibited, and persons assuming exclusively non-combat functions are not viewed as directly participating in hostilities. Measures designed to prevent and punish travel for the purpose of engagement in, or support of, terrorism should therefore exempt acts that are otherwise lawful under international humanitarian law.

[8] See Lieven Pauwels, and others, Explaining and understanding the role of exposure to new social media on violent extremism: an integrative quantitative and qualitative approach (Gent, Academia Press, 2014). See also Nele Schils and Lieven Pauwels, "Explaining violent extremism for subgroups by gender and immigrant background, using SAT as a framework", Journal of Strategic Security, vol. 7, No. 3 (Fall 2014); Lieven Pauwels and Maarten De Waele, "Youth involvement in politically motivated violence: why do social integration, perceived legitimacy, and perceived discrimination matter?", International Journal Of Conflict And Violence, vol. 8, No. 1 (Fall 2014); Lieven Pauwels and Nele Schils, "Differential online exposure to radical content and political violence: testing the relative strength of social learning and competing perspectives", Terrorism and Political Violence, (Sept. 2014).

45. The Working Group learned that Belgium is seeking to apply Security Council resolution 2178 (2014) in its national efforts. The Working Group reiterates its concern with respect to the broad application of that resolution, as already noted in its 2015 report to the General Assembly. States such as Belgium (see para. 90 below) have adopted measures that may disproportionately restrict freedom of movement and the rights to citizenship, due process and presumption of innocence, and that unnecessarily expand powers for emergency surveillance, arrest, detention, search and seizure. The Working Group notes that it is difficult to prove levels of intent linked to criminalizing terrorism-related activities. For instance, women who go abroad to marry fighters, send money to fighters, or undergo training may be considered to have participated in activities amounting to terrorism, for which it is challenging to prove intent.

46. Security Council resolution 2178 (2014) addresses foreign terrorist fighters only, not foreign fighters per se. The Working Group therefore emphasizes the importance of distinguishing between the two, especially given the absence of clarity on international legal definitions of the terms "terrorism" and "foreign fighters". More precise definitions of those terms would mitigate misapplication of Security Council resolution 2178 (2014), limit human rights infringements and ensure accurate targeting for accountability. Legal definitions should be used to guide decisions about the political definitions being applied.

## VII. Measures

47. The Working Group was informed that a number of measures have been taken by authorities at all levels to counter the issue of foreign fighters. At the federal level, the Ministry of the Interior and its Coordination Unit for Threat Analysis collate information from relevant agencies in its database for assessment.

48. In November 2015, following its visit, the Working Group was informed that the budget for security and the fight against terrorism in Belgium had increased by 400 million euros. Part of the budget would be allocated to the State Security Service and the Ministry of Defence. Further measures have included the reinforcement of police border controls and the deployment of an additional 520 military personnel to assist with security. The number of federal magistrates has also risen, from 24 to 28, two of whom focus specifically on terrorism.

49. A proposed revision of article 12 of the Constitution would allow for 72 hours of administrative detention for acts of terrorism instead of 24 hours. In addition, the law of 7 June 1969 was amended to permit house searches 24 hours a day. Wearing electronic bracelets will also be required for people who are registered by the State Security Services as a threat. The exclusion of "hate preachers" through a screening process can result in such individuals being placed under house arrest, detained in prison, or facing potential expulsion from the country. Places of worship that are not officially recognized by the Government and where jihadism is propagated will also be dismantled. Websites that are identified as "preaching hate" will also be closed down. The screening of potential employees for jobs in sensitive sectors will be reinforced. It is no longer possible to purchase prepaid telephone cards anonymously.

50. On 16 January 2015, 12 measures were announced by the federal Government and a further 18 measures followed in November 2015, covering, inter alia, inclusion of a new terrorism offence in the Criminal Code, extension of the list of offences giving rise to the use of special investigation methods, broadening the scope of withdrawal of nationality and passports, revised monitoring procedures, exchange of information and addressing radicalization in prisons. The Working Group reiterates its call for respect for human rights

in the implementation of those measures, notably for the rights to privacy, to freedom of expression and movement and to a nationality. The first 12 measures are:

(a) Extending terrorist offences and amending the law with a view to more effective punishment, and including travelling abroad for terrorist purposes as a new terrorist offence in the Criminal Code;

(b) Extending the list of offences leading to the use of specific methods of investigation (article 90 ter of the Criminal Procedure Code) to include incitement to terrorism, recruitment, training and travelling abroad for terrorist purposes;

(c) Broadening the scope for withdrawing nationality;

(d) Introducing the possibility of withdrawing passports and identity cards, or refusing to issue them, when the individual in question poses a risk to public order and security;

(e) Activating the legal mechanism for identifying persons involved in financing terrorism and freezing their assets;

(f) Revising the circular of 25 September 2014 concerning information management and monitoring measures for foreign fighters resident in Belgium in order to simplify the current structures, ensure a clearer division of tasks between services and systematize the way in which monitoring is conducted;

(g) Optimizing the exchange of information between administrative and judicial services and authorities;

(h) Revising the 2005 anti-radicalization plan to take account of recent developments;

(i) Combating radicalization in prisons through better detection of radicalized inmates and those who encourage radicalization and the implementation of countermeasures; training of prison staff and collaboration with Islamic advisers are crucial;

(j) Reforming the intelligence and security structures of the National Security Council;

(k) Deploying the army for specific surveillance assignments;

(l) Strengthening the analysis capabilities of the State Security Service.

51. The Working Group observed that recent measures had been developed as a quick response to the threat of foreign fighters, triggered by recent events, but that the responses had not necessarily been informed by in-depth reflection or analysis of the phenomenon.

52. The recent response had been influenced by the fact that the federal level was competent mostly on security and repressive measures, rather than other areas relating more to prevention. An overall integrated plan could not therefore be developed very effectively, and different government entities at different levels developed their individual programmes without coherent cooperation. One notable attempt at coherence was the development by the College of Prosecutors of circulars on foreign fighters, which were sent to all relevant magistrates.

53. The Working Group learned that decision-making has not at times been fully consultative, notably regarding consultation and collaboration with lower levels by higher levels, such as national level competences with regional or community competences. Efforts are further hindered by financing arrangements, including the fact that for some projects, working with cities means working with the federal, regional or community levels as cities are funded by those other levels, despite the assertion of autonomy among the

different levels. These concerns may be among the factors contributing to the prominence given, as observed by the Working Group, to security-oriented and punitive responses, including with respect to financing, in comparison to preventive and rehabilitative approaches. The Working Group thus supports a fully integrated approach to the foreign fighter phenomenon, developed with the widest possible participation by all levels, and reiterates its recommendation for a balance between security, and social and human rights, considerations.

54. The Working Group notes that, since the phenomenon is relatively new for Belgium and measures are only very recently being developed and implemented, it is too early for evaluations to yield assertions of good practice in these efforts.

55. The Working Group was advised of the policy and administrative initiatives under way at the federal, regional and community, and local levels, as detailed below. In general terms, the initiatives reportedly emphasize prevention, criminal law, research, enhanced communication, capacity-building and strengthening of resilience.

56. The Working Group learned that a coordination mechanism for the prevention of radicalization was set up in the Brussels-Capital Region. The Region is reportedly committed to eight concrete actions:

(a) Implementing a structured network of people at different levels of power;

(b) Providing a structured reservoir of resource persons to better understand the phenomenon of radicalization and to act with the appropriate tools;

(c) Initiating, supporting and developing awareness-raising or training;

(d) Informing partners of existing initiatives in the Region and beyond, with the aim of disseminating good practices in Belgium and abroad;

(e) Setting up an information and assistance point for young people, parents or concerned third parties;

(f) Serving as a relay for requests from municipalities to political and judicial authorities to improve monitoring of the phenomenon;

(g) Developing a network of external partners to monitor individual situations;

(h) Seeking support at the federal, European and international levels from recognized experts.

57. It was reported to the Working Group that the French Community and the Wallonia and Brussels Regions intended to mobilize all their stakeholders, including those working in the fields of compulsory and higher education, social advancement education, youth, youth welfare, sports, culture, associations, equal opportunities, the media, the houses of justice and the civil service, to bring sustainable solutions to the root causes of radicalization and its prevention. They had thus established an anti-radicalization network, bringing together different actors from associations, teaching and administration around three themes:

(a) Exchanging best practices in awareness-raising and training programmes for front-line players and ensuring wide dissemination of best practices;

(b) Ensuring and improving the consistency of prevention and educational tools for front-line players using websites, free telephone services, brochures and so forth;

(c) Strengthening knowledge and expertise on the phenomenon of radicalization.

58. A series of initiatives had been taken in terms of training for teachers and staff working with young people, gradually including all federal competency areas that would benefit from specific tools and training.

59. The Flemish government, which encompasses Community and Regional competences, is also taking initiatives. On 16 January 2015, the Flemish government approved a concept paper on the prevention of radicalization processes that can lead to extremism and terrorism, which includes a strategic framework for dealing with radicalization and identifies some key action areas. The action plan reportedly seeks to concretize the concept paper and was developed in consultation with various stakeholders, including representatives of the cities of Antwerp, Vilvoorde, Kortrijk, Mechelen and Maaseik, the Muslim Executive, and relevant embassies.

60. The areas of action in the plan are:

(a) Information sharing, harmonization and coordination, internally and with the other authorities;

(b) Harmonization between the needs of local actors and the subsidizing authorities, including support for projects on education, preventive welfare and youth assistance services in municipalities facing radicalization problems, as well as pathways towards work;

(c) Supralocal expertise development and the sharing of good practices in support of the local prevention of radicalization policy;

(d) Research into the reasons for radicalization, including interdisciplinary exchange;

(e) Support to front-line employees, including care providers, teachers, youth workers and imams, to help them acquire knowledge and skills through education, expertise development and the availability of good practices, comprising, inter alia, train-the-trainer programmes; and supplying expertise on interculturalism to local actors in the municipalities, disseminating guidelines for teachers and other staff employed in pupil guidance centres on how to deal with signs of radicalization, and sharing of information between youth work organizations;

(f) Consultation with representatives of different philosophical beliefs, to facilitate interfaith dialogue and enhance interfaith skills in youngsters and teachers, as well as developing social orientation and Dutch as a second language training for imams;

(g) Support for parents from a network of experts, a help desk for parents, friends and acquaintances of young people who are being radicalized, and harmonization of efforts among the Departments of Education and Welfare, Public Health and Family;

(h) Increase young people's resilience, with the introduction of resilience trainings for youngsters in education, welfare and youth assistance forums;

(i) Reinforce organizations that can support young people in their search for an identity of their own;

(j) Flemish instruments at the disposal of the federal authorities within the framework of deradicalization and the approach to radicalization in prisons;

(k) Active Flemish public diplomacy and investment in sound public perception, with the Flanders Department of Foreign Affairs sharing knowledge with other countries regarding the preventive approach to radicalization, and a media strategy countering polarizing coverage.

61. The Working Group was informed that among the measures taken was financial support provided by the Ministry of the Interior, at the federal level, to 109 cities and municipalities, which determine their own priorities, with annual additional subsidies to 10 more. Initiatives from Communities and Regions included a helpline for parents, interfaith dialogue, training of front-line professionals on identity development for Muslim youth, and support to families or peers. The Working Group commends those efforts, and recommends that a more extensive study be conducted in order to better inform current and future measures, and that longer-term structured frameworks and approaches be adopted.

62. Against the backdrop of that spectrum of measures, the Working Group emphasizes that focus must be placed on preventive as well as rehabilitative measures that respond to the immediate and the root causes of the foreign fighter phenomenon, with full respect for human rights. Punitive measures should be followed up by magistrates, in order to ensure the right to a fair trial and confidence in the justice system.

63. The Working Group also received information on action that has been ongoing in the city of Brussels since 2012 and is coordinated at the mayoral level. The two key objectives are managing the risk of those who are being radicalized, and preventing radicalization. The approach to prevention encompasses informing the public, training professionals among those in contact with at-risk groups and providing them with tools, and developing a supportive context, including through protocols with schools and other services for referring people to the appropriate unit. The programme has worked with 40 families and individuals since 2013, both indirectly and directly, including persons who are considering joining or have already joined ISIL or Al-Nusrah Front. The methodology reportedly involves behavioural indicators, interview procedures, protocols for making contact and developing a framework for disengagement through partnership with the individual's family, school or other relevant actors.

64. Among the challenges identified in implementing those measures were the need for institutional coordination and understanding of one's own level and role; the fact that confidential information gained in a professional capacity cannot be shared despite the duty to report, as in the case of social workers who face information requests from the police; the requirement for methodological tools to operationalize academic findings; and the need to build confidence in local communities to facilitate requests for help.

65. The authorities reported that all military staff are trained in the principles of international humanitarian law and human rights law, and extra courses are foreseen for all staff prior to deployment in the field. An additional five-week programme on armed conflict and fundamental principles relating to human rights is also provided for some officers. The Working Group commends those efforts, and encourages similar training focused on human rights for all staff of services dealing with the foreign fighter phenomenon, notably the police.

66. The Working Group also learned of measures and efforts regarding foreign fighters in the city of Antwerp, where initiatives are reportedly taken at the individual and group levels. Individual programmes aim to reintegrate radicalized youngsters by re-establishing communication with family, as well as providing psychosocial support for parents and families. Group programmes support organizations and institutions such as schools, mosques and youth organizations through sensitization support and training.

67. Challenges noted in implementing security and social policy included the fact that community members may have a larger transnational identity and that there are no clear guidelines or support on how to be a Muslim in a secular society.

68. One specific concern is that radicalized individuals are placed on no-fly lists when they are identified as a threat, but the lists are not updated once the individuals have been reintegrated, thus potentially resulting in unnecessary travel restrictions. The Working

Group reiterates the need to balance concern for the protection of human rights and rehabilitation on the one hand, and security on the other.

69. The city of Liège appointed a radicalization prevention coordinator in October 2014. A local intersectoral consultative group was also established, covering areas such as justice departments and schools. An action plan has been developed for sensitization on intercultural issues and addressing discrimination with schools, sports clubs and youth clubs, as well as providing psychosocial support.

70. It was brought to the attention of the Working Group that one of the key challenges in programme implementation was overcoming the silo structure of intersectoral work. Also, schools need time to adjust, as this is the first time that they are working on terrorism issues. Other considerations are the time investment for coordination and consultation, the stigmatization of communities and threats and corresponding hindrances for social cohesion, as well as the need to strike a balance between public security and human rights.

71. In the municipality of Anderlecht, projects have been developed to support mosques in addressing radicalization, through visits and conferences on issues such as resilience and addressing multiple identities. The programme also involves training opportunities for persons in mosques and visits to different places of worship to share different traditions. A future project will invite a former jihadist from France who had been in Afghanistan and in prison, to explain his choices to students.

72. It was noted that 12 persons from Anderlecht had left or attempted to leave for the Syrian Arab Republic, 5 of whom had died in combat, 2 had failed to leave and 5 had returned. The unemployment rate in Anderlecht is 25 per cent, and 29 per cent of the population is of North African or sub-Saharan African descent. There are neighbourhoods that serve as the first points of arrival for new migrants, where the church and mosque play a role in cohesion. Anderlecht was also the location in which the Sharia4Belgium group was reportedly most active.

73. It was asserted that the municipality of Vilvoorde has one of the highest levels of foreign fighters leaving the country. There were 28 reported departures, 5 deaths and 8 returnees, 3 of whom lived in Vilvoorde, 1 had died and the others were in prison. The first departures had taken place in 2012, in some cases with more than one person from the same family leaving. They were reportedly associated with Sharia4Belgium and with protests against an anti-Islamic movie.

74. In response, an integrated plan has been developed. It operates on three levels: prevention, creating alliances with the police, and working with returnees. The Working Group observes that a clear balance must be struck between repressive measures such as police searches, and the need to build trust with communities, including to earn their collaboration.

75. Reasons for return include the birth of a child and promises that have not been fulfilled. One reintegrated returnee is reported to be back in school and with a student job. Reintegration of returnees has reportedly posed dilemmas, such as political sensitivity around their occupation of government-funded social housing in areas where there is anti-returnee sentiment, and stigmatization of their children in schools. It is reported that it is unclear what the role of the city is in addressing the stigma.

76. The Working Group met with civil society organizations working with the families of foreign fighters. It also learned of initiatives by Muslim organizations, such as texting friends fighting abroad and asking them to return home.

### Administration of justice

77. The Working Group was informed that out of the 46 individuals indicted in the Sharia4Belgium trial, 45 had been convicted, including alleged jihadists and recruiters. One had been acquitted and 4 had appealed. The judgment of 11 February 2015 pronounced Sharia4Belgium a terrorist group based on analysis of its website and alleged evidence of organized indoctrination of young people, as well as the recruitment of young people for combat. Members were also convicted for leadership of a terrorist group, carrying a 15-year sentence, participation in a terrorist group, incurring a 5-year sentence, and for terrorist threats. Of the 46 members that had gone to the Syrian Arab Republic, it was reported that there were indications that 9 had been killed, 7 had returned to Belgium and 30 were still active in the Syrian Arab Republic.

78. The Working Group was informed that, in the Sharia4Belgium case, 37 persons were sentenced in absentia by default. Those whose deaths could not be proven were convicted. The courts also granted partially suspended sentences for returnees. Additional information indicates that persons sentenced to imprisonment for 5 years or more in the Belgian system can have their Belgian nationality revoked under article 23 (2) of the Nationality Code. The Working Group expresses its concern that such decisions may have the effect, intended or unintended, of preventing the return of Belgian citizens and denying the opportunity for deradicalization, reintegration and rehabilitation in society.

79. At the time of the Working Group's visit to Belgium, 90 foreign fighters had already been convicted and many additional convictions have since been made. The Working Group learned that a number of persons charged with, or convicted of, terrorism are currently in prison in Belgium. It is reported that for a conviction, it must be proven that a person is a member of a terrorist group with the knowledge that his or her participation contributes to the commission of a crime or a felony by the terrorist group. All charged terrorists are held in single cells and have limited contact with other prisoners.

### European level

80. Within the European Union, the Belgian Minister of the Interior has, since 2013, organized meetings of a small group of the member States most affected by the phenomenon of foreign terrorist fighters: Austria, Belgium, Denmark, France, Ireland, Italy, the Netherlands, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland. The meetings are held on the margins of the Justice and Home Affairs Council and are intended to assist the Council's work. Belgium also participates in the Council Working Party on Terrorism (International Aspects), which focuses on external aspects of the fight against terrorism, European Union policy, and action to help third countries fight the phenomenon.

81. The Working Group learned that the European Parliament is currently considering a motion for resolution on prevention of radicalization and recruitment of European citizens by terrorist organizations. It includes a proposal for preventing radicalization in prisons. The Working Group urges extensive and meaningful consultation with all stakeholders in the process of assessing of those proposals, and the inclusion of human rights reviews and consideration of prison reform.

82. Belgium held the chairmanship of the Committee of Ministers of the Council of Europe from November 2014 to May 2015. The Brussels ministerial meeting of 19 May 2015 led to the adoption of a political declaration against extremism and radicalization, accompanied by an action plan, as well as the adoption of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism. The protocol, which focuses on foreign terrorist fighters, includes the implementation of aspects of criminal justice contained in Security Council resolution 2178 (2014).

83. It is noteworthy that, inter alia, the Council of Europe action plan aims to reinforce the legal framework against terrorism and violent extremism, and to prevent and fight violent radicalization through concrete measures in the public sector, in particular in schools and prisons and on the Internet. The Working Group agrees with those elements of the action plan that acknowledge the critical need to emphasize the use of school curricula in Europe to foster dialogue about democratic culture and intercultural dialogue.

84. The Working Group was informed that despite the fact that there are estimated to be about 5,000 foreign fighters of European origin, there have been very few convictions of foreign fighters. That is largely attributed to the lack of evidence, notably from the Syrian Arab Republic and Iraq. As such, much of the evidence is culled from social media. The Working Group recommends heightened cooperation at the European and international levels for evidence gathering and information sharing, including building on existing data exchange experiences.

**International level**

85. At the multilateral level, Belgium is an active member of the anti-ISIL coalition, both at the level of military involvement and in terms of participation in coalition working groups. Belgium, while not a member of the Global Counterterrorism Forum, participates in its meetings of experts on the issue of foreign terrorist fighters. Belgium also cooperates with some subsidiary bodies of the Security Council, such as with regard to the implementation of resolutions 1373 (2001) and 1267 (1999).

86. With respect to the application of Security Council resolution 2178 (2014), as mentioned above, it is reported that the Belgian legislative framework is in full compliance with the obligations contained in the resolution, in particular the anti-terrorist provisions on participation and leadership of a terrorist group (Criminal Code, art. 140), supply and attendance of training for terrorism (Criminal Code, arts. 140 quater and quinquies) and the provision of assistance, including financial assistance, to a terrorist acting alone (Criminal Code, art. 141). Additionally, fundraising in order to finance terrorism is considered by the Brussels Court of Appeal as an act of participation in a terrorist group, according to its judgments of 26 June 2008, 1 December 2010 and 21 February 2013.

## VIII. Human rights issues

87. With continuing threats of terrorism and fighters returning from conflict zones abroad, Belgium has employed an array of multilevel initiatives that include prevention policies, deradicalization programmes, counter-narrative campaigns and criminal prosecutions, as well as monitoring and administrative sanctions.

88. Despite the impressive range of actors involved in deradicalization programmes and counter-terrorism initiatives, the larger focus has been on security, repression and prevention, while human rights issues and social and economic considerations have been assessed to a lesser degree. While acknowledging that there are overwhelming and legitimate concerns regarding national security against the backdrop of recent terrorist attacks, the Working Group stresses the need to adopt a human rights-based approach to address root causes and motivations of foreign fighters, many of which stem from social and economic factors rather than religious fundamentalism.

89. As mentioned above, the Working Group was informed that most of those who become foreign fighters have a non-European family background, are members of the lower socioeconomic classes and face particular difficulties in accessing employment, housing, health and education. Reported discrimination in the job and real estate market, educational

deficiencies, along with a lack of a strong sense of identity and belonging are factors that may fuel the desire to fight abroad in conflicts like the one in the Syrian Arab Republic.

90. These social and economic concerns are human rights concerns which need to be effectively addressed alongside security and preventive measures. The issue of identity was repeatedly raised as a critical factor in the Working Group's meetings with interlocutors. Third-generation Belgians of North African descent are still sometimes considered by Belgian society as Moroccan, for example, notwithstanding the fact that they may have been born and raised in Belgium. The building of democratic values, intercultural dialogue, education and awareness around the issue of identity can foster greater social cohesion, which in turn assists in tackling the motivational factors prompting young Belgians to go and fight abroad.

91. The Belgian authorities assert that, given the serious nature of terrorist offences, particular investigation methods, such as wiretapping or proactive investigations specific to serious crimes, are now applicable to all behaviours listed in book II, title I *ter*, of the Criminal Code relating to terrorist offences, and not only to the acts referred to in section 137 of the Code. These methods therefore apply to the new offence of travelling abroad in order to commit a criminal offence under section 140 *sexies* of the Code. The Working Group was informed that surveillance takes place under the control of the judiciary.

92. The Working Group calls for respect for human rights in the implementation of all measures, notably for the rights to privacy, to freedom of expression and movement and to a nationality. In that regard, the work of the parliamentary Privacy Commission is critical.

93. In the context of the broader international community, special consideration must also be given to the rights of Belgian children, of foreign fighters under 18 years of age recruited into armed groups, and of Belgian women whose activities in conflict areas may constitute sexual slavery and violation of the right to security of the person.

94. The Working Group reiterates the fundamental need to ensure adherence to and consistency with international human rights law and international humanitarian law in the implementation of numerous measures to counter the phenomenon of foreign fighters and terrorism. Furthermore, any measure that infringes on human rights, such as the right to privacy, the right to be free from arbitrary deprivation of liberty, the right to freedom of movement and the right to freedom of expression, must be necessary and proportionate to the specific risk being addressed and should be accompanied by adequate procedural safeguards, as well as effective and independent oversight to ensure against human rights violations by the authorities.

## IX. Returnees

95. As noted above, it is reported that 128 foreign fighters have returned to Belgium. At the time of the Working Group's visit, there were 108 male returnees and around 19 female returnees. The majority of returnees, 67 of them, were aged between 20 to 30, while 8 were reported to be under 20 years of age. Exact figures are difficult to verify, a task further complicated by false registrations of death.

96. Reportedly, foreign fighters return for a variety of reasons. Some may experience the fragmentation of and fighting among the different groups in the Syrian Arab Republic, such as ISIL, Al-Nusrah Front and Al-Qaida, and in the process may end up fighting their friends, and thus becoming disenchanted. A number of returnees may have gone abroad looking for adventure and return disillusioned, others get fatigued or are unable to adjust to the daily regime and diet, while others miss their families and want to return.

97. A number of returnees reportedly come back with a mission. The attacks in Belgium fuel Islamophobia and feed into the agenda of ISIL, including by making Muslims feel unsafe in Europe and prompting them to begin to feel that a caliphate in the Syrian Arab Republic may indeed be their only possible home.

98. It is reported that ISIL authorizes fighters to leave only in certain situations, such as a wedding or imminent death of a family member, or for the purposes of recruiting, raising funds or committing an attack. It is also reported that those wishing to leave for other reasons may be executed.

99. The authorities determine the threat posed by returnees partly based on their reasons for departure or return. The "hard-core jihadis" are reported to be the most menacing and are linked to security incidents, such as the Verviers raids, while frustrated "rebels" or disillusioned idealists are also known to execute attacks. Depending on the level of threat they are deemed to pose, returnees may be monitored by police or other services upon their return.

100. According to government officials, foreign fighters and suspected foreign fighters fall within the jurisdiction of the ordinary courts and enjoy the same rights as any accused during arrest and detention, interrogation and hearings, including with regard to convictions and the opportunity to lodge appeals.

101. The Working Group was informed that detainees suspected of terrorism-related offences or convicted of such offences under articles 137 to 141 of the Criminal Code, including prisoners known as foreign terrorist fighters are treated in accordance with the principles of the law of 12 January 2012 concerning prison administration and the legal status of inmates. The usual approach to classification, standardization and the establishment of safe reintegration is also applicable to them. No distinction on the basis of geographical or conflict-related criteria is made vis-à-vis the management of their detention or rehabilitation.

102. Additionally, it is reported that in Belgium the courts provide information to judicial and administrative authorities, inform and assist victims of crime, inform citizens and monitor offenders in the execution of the sentence or the measure decided by the judge. As part of that jurisdiction, there is currently no distinction made on the basis of whether the offender is a foreign fighter or not. The monitoring of conditions imposed by the court is done according to methods applied to any case.

103. The Working Group notes the need for effective, structured reintegration and rehabilitation programmes for returnees. The observation was made to the Working Group that this may be partly the result of the fact the competence for reintegration programmes does not lie at the national level. It was also reported that the lack of a coherent programme may serve as a deterrent for some foreign fighters to return, and safe return involving the protection of their human rights may need to be coordinated more among local authorities and families.

104. In that respect, the Working Group reiterates its recommendation for an integrated national approach to foreign fighters involving all levels of the administration. It is encouraged by the work being undertaken at the local level in the city of Brussels, in Vilvoorde and among the French-speaking community, and recommends that such work be considered for evaluation and possible application throughout Belgium should its effectiveness be proven. Efforts should encompass both psychosocial and legal support to returnees, including for addressing trauma and reconstructing their identity and family and community ties. Support to families and initiatives to remove the stigma for those not convicted of serious crimes could be especially useful.

105. The Working Group supports the application of proven good practices, and notes promising programmes such as the Danish Aarhus model, particularly with mentorship, being employed in municipalities such as Vilvoorde and in the French-speaking community. The Working Group also acknowledges that the specific context presented by Belgium may mean that approaches utilized elsewhere may not fully apply or produce the same results.

## X. Conclusions and recommendations

106. **Given the constellatioa of actors involved, the proliferation of initiatives on foreign fighters, the complex political context and the aforementioned socioeconomic disparities, as well as the potential threat posed by the prolongation of the phenomenon, the Working Group deems it critical to ensure effective collaboration between the various entities addressing this issue in moving towards a sustainable solution. In this regard, the Working Group recommends strengthening the above-mentioned national plan and fully integrating it through the broadest possible participation, ensuring that it is informed by multidisciplinary in-depth research and analysis.**

107. **The plan should yield a clear understanding and valuing of respective expertise and roles. It should also attract the necessary resources for full implementation immediately and in the medium and long term, with a budget that is based on consultation and strikes more of a balance between expenditure on preventive and social measures. It must adopt a human rights-based approach in all stages of implementation, and particular attention should be paid to the inclusion of especially affected communities, with clear indicators, as well as monitoring and evaluation of related programmes.**

108. **While the Working Group was informed that Belgian legislation attempts to strike a balance between security and human rights, the Working Group recommends that government efforts at combating the phenomenon place strong emphasis on the social dimension, including integration, equality and non-discrimination, in keeping with international human rights standards and the obligations of Belgium as a State party to the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and all the other core human rights instruments. Special consideration should be given to addressing issues that lead to Islamophobia and anti-immigrant sentiment in the country, with recognition in schools and cultural programming of Muslims and the history and contributions of migrants to Belgian society.**

109. **Similar initiatives are encouraged from civil society organizations and grass-roots projects, particularly emanating from the Muslim community. Parents and families may also need to acquire the awareness and skills to address the needs of children with diverse heritage.**

110. **A clear definition of a foreign terrorist fighter adopted by the federal Government, and related guidelines, could also help to ensure that those who are reintegrated or have not yet left for the Syrian Arab Republic would not be treated by the authorities in the same way as convicted terrorists.**

111. **The Working Group stresses that greater social cohesion will mitigate long-term security risks, and that focus on strong support to communities and families can also lay the groundwork for the optimization of measures. In this respect, intercultural institutions, policy and dialogue would be instrumental in building**

community ties, and the Working Group recommends building on the foundation being developed in this regard, such as the Minister for Civil Integration in the Flemish region, and egalitarian staffing policies.

112. Similarly, education has been consistently raised as a crucial vehicle for awareness-raising and dialogue. The Working Group supports raising awareness in schools and related platforms where student dialogue can take place, particularly from the primary level of education. Promoting inclusive education of citizens and developing positive counter-narratives against violent extremist propaganda can also be implemented through education and awareness-raising programmes.

113. Deradicalization in prisons should continue to be prioritized and implemented effectively, within the framework of respect for human rights.

114. Coordination was a recurrent theme among the Working Group's interlocutors. Local authority staff and others noted that institutional coordination was crucial for the effectiveness of programmes, as was a clear understanding of one's level and role in the larger federal system. Such coordination could prove critical in, for example, centralizing information from different agencies with a view to identifying the best entry points for action and standardization, as well as the sharing of methods and expertise. In the absence of such coordination between federal and local levels, for example on policy, public trust at the local level may be undermined as there is no coherent message or clear policy direction. The development of specific entities and a common database accessible to authorities and actors at all levels, including prevention workers, could be instrumental in ensuring coordination.

115. In terms of action at the European and international levels, the Working Group recommends improved coordination, including within the Council of Europe, the European Union and, crucially, between foreign fighters' countries of origin and countries through which they transit. It also strongly recommends effective cooperation for information sharing and evidence gathering to support legal proceedings. In this respect, it commends Belgium for its exchanges with Eurojust.

116. The Working Group emphasizes that State responses to foreign fighters must balance punitive measures with preventive ones and ensure rehabilitative opportunities for returning fighters. It recommends prioritizing the deradicalization and rehabilitation of returnees. While conducting its global research on the issue of foreign fighters, the Working Group received information on a series of existing rehabilitation and reintegration programmes that the Government of Belgium may wish to consider. The Danish Aarhus programme attempts to convince and assist individuals to return, while the German Hayat programme focuses on deterring aspiring foreign fighters from leaving, or if they do, urging them to refrain from engaging in acts of violence and to return home in coordination with the authorities. The Channel programme, a multi-agency scheme under the Home Office, and the Glasgow Al-Furqan Islamic initiative, both based in the United Kingdom, work with individuals who are vulnerable to radicalization.

117. In conclusion, the Working Group believes that Belgian society is at a moment of significant opportunity to move forward in addressing the complex phenomenon of foreign fighters. The Working Group urges it to make every effort at integration in that process.

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Agenda item 3
**Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development**

# Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to Ukraine

## Note by the Secretariat

The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination conducted an official visit to Ukraine from 14 to 18 March 2016. The visit examined the situation in the country with respect to the activities of mercenaries, to mercenary-related activities involving foreign fighters, and to private military and security companies. The Working Group's monitoring on foreign fighters forms part of its ongoing study to assess any possible linkages between the foreign fighter phenomenon and mercenarism, and the impact on human rights.

The report presents the main findings of the Working Group and focuses on definition and scope as regards mercenaries and foreign fighters, as well as on motivational factors and recruitment. Particular attention is given to the proliferation of foreign armed actors in the context of ongoing conflict in the country. The report also covers the various measures taken by the Government of Ukraine to address these issues. The Working Group provides recommendations to all parties to the conflict and to the Government, with a view to full respect, protection and fulfilment of human rights.

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# Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to Ukraine*

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* Circulated in the language of submission only.

# I. Introduction

1. The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination visited Ukraine from 14 to 18 March 2016, at the invitation of the Government. The delegation comprised the Chair and Rapporteur of the Working Group, Patricia Arias, and Working Group member Saeed Mokbil, as well as staff of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Geneva and interpreters.

2. The Working Group wishes to thank the Government of Ukraine for its cooperation. It also expresses its appreciation to the human rights monitoring mission in Ukraine for the excellent support in organizing and facilitating the visit.

3. Pursuant to Commission on Human Rights resolution 2005/2, Human Rights Council resolution 30/6 and General Assembly resolution 70/142, the Working Group is mandated to monitor mercenaries and mercenary-related activities in all their forms and manifestations globally. The mandate also includes the monitoring of the activities of private companies that offer military assistance, consultancy and security services on the international market, and of the effects of those services on the enjoyment of human rights, particularly the right to self-determination.

4. In 2014, the Working Group decided to explore the growing phenomenon of foreign fighters, in order to assess any possible linkages with mercenarism as well as the impacts on human rights and the right of peoples to self-determination. The Working Group conducted a year-long study that included a series of expert meetings, panel events, and extensive research on the subject of foreign fighters in order to prepare its 2015 report to the General Assembly (A/70/330). In that context, official visits were undertaken to Tunisia in July 2015 (see A/HRC/33/43/Add.1) and to Belgium in October 2015 (see A/HRC/33/43/Add.2) as part of the efforts to gather concrete information for the report to the General Assembly.

5. During the visit to Ukraine, the Working Group was able to hold meetings in Kyiv with various representatives of the executive, legislative and judicial branches of the State. It held meetings with representatives of the Ministry of Justice, the Ministry of Defence, the Security Service of Ukraine, the Ministry of Internal Affairs, the Parliamentary Committee on National Security and Defence, the Ombudsperson's Office, the High Specialized Court for Civil and Criminal Cases and the Prosecutor-General's Office. The Working Group was grateful for the opportunity to meet with members of the diplomatic community and civil society and with representatives from various United Nations offices and agencies.

6. The Working Group was able to visit Donetsk and meet with representatives of the self-proclaimed "Donetsk people's republic", including the "assistant head of the people's council", a representative of the "office of the ombudsperson", the "deputy commander-in-chief of the armed forces", a representative of the "prosecutor's office" and the "head of the accreditation of foreign representatives".

7. Although it received some information concerning the Autonomous Republic of Crimea, the status of which is determined in General Assembly resolution 68/262, the Working Group did not conduct a visit to the territory.

# II. Background and context

8. The human rights crisis in Ukraine began in November 2013, when mass protests took place in Kyiv due to the announcement by the Government that it would not sign the Association Agreement with the European Union. The protests, which began in Maidan

Nezalezhnosti (Independence Square) in the capital, spread to other parts of the country, and by mid-February 2014 had escalated into violent clashes between riot police and other security forces and protesters. The protests resulted in over a hundred deaths, mostly due to the use of firearms by government security personnel against demonstrators.[1]

9. After President Yanukovych left Ukraine, on 22 February 2014, Parliament stated that he had withdrawn from performing constitutional duties, and decided to hold presidential elections on 25 May 2014. In the meantime, on 26 February 2014, a new interim Government was formed. Starting from 24 February 2014, armed men in military uniforms without insignia, allegedly from the Russian armed forces and allied local paramilitary groups, began gradually taking over strategic infrastructure in the Autonomous Republic of Crimea. They established de facto authorities and assisted them in calling for a "referendum" in which the local population had to choose between "reunification" with the Russian Federation or remaining a part of Ukraine.[2] The General Assembly, in its resolution 68/262 of 27 March 2014, underscored that the referendum held on 16 March 2014 had no validity and could not form the basis for any alteration of the status of the Autonomous Republic of Crimea. It also affirmed its commitment to the sovereignty and territorial integrity of Ukraine within its internationally recognized borders.

10. In April and May 2014, anti-Maidan and pro-federalism supporters started to seize government buildings in a number of towns and cities in Donetsk and Luhansk regions. In early May 2014, the self-proclaimed "Donetsk people's republic" and the self-proclaimed "Luhansk people's republic" were proclaimed after "referendums" that were not recognized either by the Government of Ukraine or by the international community. In late May 2014, Petro Poroshenko won the elections and became the new President of the country, amidst reports that people in eastern regions under the control of armed groups had been prevented from voting in the elections. The formal launching of military action by the Ukrainian authorities ("anti-terrorist operation") on 14 April 2014 and the reported influx of fighters, weapons and ammunition from the Russian Federation into certain districts of Donetsk and Luhansk regions resulted in an armed conflict that reached its peak in July and August 2014, with numerous civilian casualties, caused mainly by indiscriminate shelling of populated areas. On 17 July 2014, Malaysia Airlines flight MH17 was shot down when flying over the territory controlled by armed groups in Donetsk region. The crash of the aircraft resulted in 298 deaths and prompted worldwide condemnation.

## Minsk Protocol

11. The worsening of the conflict in Ukraine led to the signing on 5 September 2014 of a first ceasefire agreement, known as the Protocol on the results of consultations of the Trilateral Contact Group (Minsk Protocol). The agreement was negotiated by representatives of Ukraine, the Russian Federation and the armed groups, under the overall facilitation of the Organization for Security and Cooperation in Europe (OSCE), which had been tasked with overseeing and assisting with the negotiation of the agreement, and its implementation.

12. The Minsk Protocol contained 12 provisions which were aimed at ensuring an immediate ceasefire, decentralization of power, the immediate release of all hostages and illegally detained persons, the continuation of inclusive national dialogues, and the implementation of measures to improve the humanitarian situation in the Donbas region in

[1] See the OHCHR report on the human rights situation in Ukraine, 15 April 2014, para. 2. Available from www.ohchr.org/EN/Countries/ENACARegion/Pages/UAReports.aspx.

[2] Ibid., paras. 18 and 19.

the east. Of interest to the Working Group was a provision calling for the withdrawal of illegal armed formations and military equipment, as well as fighters and mercenaries, from Ukraine.

13. An accompanying document known as the Memorandum outlining the parameters for the implementation of commitments of the Minsk Protocol (Minsk Memorandum), signed on 19 September 2014, clarified the conditions of the Minsk Protocol and further reiterated the need for a withdrawal of fighters and mercenaries from the conflict zone under the supervision of OSCE. However, due to ceasefire violations, the conflict continued to worsen, thus challenging the effectiveness of the Minsk Protocol to provide lasting resolution to the conflict.

14. On 12 February 2015, amidst the new escalation of hostilities in the area of Donetsk International Airport and near the town of Debaltseve, what came to be known as Minsk II was signed, stipulating further measures. Minsk II, inter alia, retained the provisions on the withdrawal of all foreign armed formations and mercenaries from the territory of Ukraine, under the supervision of OSCE, as well the withdrawal of heavy weapons by both sides to the conflict and the creation of a security zone.

15. During the Working Group's visit, there were ongoing, though reduced, hostilities in the east of the country, as is reported by the human rights monitoring mission in Ukraine.[3] As also noted in that report, OSCE observed systematic violations of the ceasefire, mainly in a number of hotspots along the contact line. With a relative decrease in the shelling of populated areas and lower levels of civilian casualties, explosive remnants of war and improvised explosive devices were the main causes of civilian casualties in the conflict zone. In addition, Ukrainian armed forces continued to position themselves near towns and villages while armed groups embedded themselves more deeply into residential areas, further endangering the local population. The risk of re-escalation of hostilities therefore remained high. The conflict continued to cause casualties. The conservative estimate by OHCHR covering the period from the beginning of the conflict in mid-April 2014 until 15 May 2016 is of 30,903 conflict-related casualties in eastern Ukraine, among civilians, Ukrainian armed forces and members of armed groups; this included 9,371 people killed and 21,532 people injured.[4]

16. The adverse impacts of the conflict significantly affected people residing in the conflict zone and all their human rights. The Working Group, when travelling to Donetsk, observed first-hand the dire situation of those living along the contact line and the extreme difficulty for individuals to move freely between the territories controlled by the Government and the territory under the control of the self-proclaimed "Donetsk people's republic".

## III. Definition and scope

17. In international law, the recruitment and use of mercenaries is covered by the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and by the International

[3] See the thirteenth OHCHR report on the human rights situation in Ukraine, covering the period from 16 November 2015 to 15 February 2016. Available from www.ohchr.org/Documents/Countries/UA/Ukraine_13th_HRMMU_Report_3March2016.pdf.

[4] See the fourteenth OHCHR report on the human rights situation in Ukraine, covering the period from 16 February to 15 May 2016, para. 23. Available from www.ohchr.org/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf.

Convention against the Recruitment, Use, Financing and Training of Mercenaries, to which Ukraine is a party. A mercenary is defined in Protocol I as someone who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Does, in fact, take a direct part in the hostilities;

(c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;

(d) Is neither a national of a party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) Is not a member of the armed forces of a party to the conflict; and

(f) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

18. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries stipulates that the recruitment, use, financing or training of mercenaries is an offence, and prohibits States parties from engaging in such activities. It provides a similar definition of mercenary to that in Protocol I, but adds that a mercenary is someone who:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation.

19. Regarding foreign fighters, there is no internationally agreed legal definition for this phenomenon, nor a specific regime governing them. Foreign fighters are generally understood to be individuals who leave their country of origin or habitual residence and become involved in violence as part of an insurgency or non-State armed group in an armed conflict. Foreign fighters are motivated by a range of factors, notably ideology, but can also be attracted to fighting for financial reward. Foreign fighters are obliged to respect the applicable rules of international human rights law and international humanitarian law during armed conflicts.

20. Though there are similarities in the definitions of a mercenary and a foreign fighter, the latter may also include nationals of a party to the conflict, for example a member of the diaspora who returns to join the conflict. A mercenary cannot be either a national of a party to the conflict or a resident of a territory controlled by a party to the conflict. Similarly, foreign fighters, although they may or may not be nationals of a party to the conflict, do not reside in the State affected by the conflict and have travelled from abroad to join the conflict.

21. With regard to the conflict in Ukraine, the Working Group does not make any determination as to whether the conflict is internal or international in character, as it considers this to be beyond the scope of its mandate.

## IV. Proliferation of foreign armed actors in the conflict

22. The participation of foreign armed actors in the conflict in Ukraine is an established fact that neither the Government nor the armed groups deny. The declaration of the self-proclaimed "Donetsk people's republic" and the self-proclaimed "Luhansk people's republic" not only precipitated the escalation of the conflict in certain districts of Donetsk and Luhansk regions, but also prompted these fighters to come from abroad. The exact number of foreign fighters who have taken part in the conflict is difficult to estimate. In June 2014, research undertaken by the Ukrainian Centre for Economic and Political Studies estimated their number at 5,000, which included "Kadyrov fighters from Chechnya, Cossacks, mercenaries, and members of Crimean Alpha and Berkut units". The Working Group was informed by the Ukrainian authorities of large numbers of fighters from the Russian Federation serving in armed groups of the self-proclaimed "Donetsk people's republic" or the self-proclaimed "Luhansk people's republic". According to Ukrainian officials, about 8,000 of an estimated 42,000 fighters were alleged to be from the Russian Federation.

23. The Working Group was informed that foreign armed actors also came from various countries, mostly in Europe, to join both the armed groups of the self-proclaimed "Donetsk people's republic" and the self-proclaimed "Luhansk people's republic", and volunteer battalions on the side of the Government.

24. With regard to the volunteer battalions fighting for the Government, the Working Group was informed that while some foreigners had clearly travelled to Ukraine to support the Government in the conflict, other foreigners who had joined the volunteer battalions were already residing in the country before the outbreak of the conflict. Their presence in the country was for various reasons, such as the desire to reside with family and relatives. Some of these foreigners did not have passports or were considered to be stateless, and had thus remained in the country. Other foreigners had come to Ukraine when it was still a part of the Union of Soviet Socialist Republics but had never acquired citizenship after Ukraine declared its independence.

25. The explanation received from the government authorities regarding the establishment of the volunteer battalions was that when the conflict broke out in the country, the available military forces were not sufficient to combat the growing number of fighters in armed groups in the eastern part of the country. To support its military operations, volunteer formations were established under the auspices of the Ministry of Defence and the Ministry of the Interior, specifically the National Guard of Ukraine, which citizens of Ukraine, foreign nationals and stateless persons joined. Over 30 territorial defence battalions were created by the Ministry of Defence. The Working Group was informed that in order to join a battalion, volunteers had to undergo a medical examination, register as reserve military servicemen and prove that they did not have any criminal record.

26. The Working Group was informed by the authorities that volunteer battalions, though partially composed of foreigners, could not be considered as mercenaries as most members had joined to support the country against what was deemed as aggression fuelled by the Russian Federation. Financial gain was reportedly not the primary incentive for fighting, as many volunteers had had to purchase their own food, uniform and protective equipment due to the State's lack of resources and inability to provide these items during the conflict.

27. In its discussions with the Security Service of Ukraine, the Working Group was informed of at least 176 foreigners serving in certain districts of Donetsk and Luhansk regions, under the control of armed groups, whose identities had been established and who

were from 26 countries, including Belarus, France, Georgia, Germany, Italy, Kazakhstan, Latvia, Poland, Serbia and Spain. Many of these reportedly fought in what is known as the "fifteenth international brigade".

28. During the meeting with the representatives of the self-proclaimed "Donetsk people's republic", the Working Group was informed that there were currently 50 "internationalists" serving in its armed groups, whose conditions of service, including accommodation, food and payments, were the same as those of their local counterparts. There was no criterion for a particular nationality to be able to serve in the armed group.

29. Some information shared with the Working Group indicated that groups of fighters, including foreigners, had also been recruited with the financing and support of wealthy individuals. One such battalion was known as "Dnipro-1", composed mostly of Ukrainian citizens and reportedly financed by the then head of the Dnipropetrovsk regional state administration.

30. During the visit, the Working Group requested both to the Government and to the representatives of the self-proclaimed "Donetsk people's republic" to meet with foreign fighters in their custody, but was regrettably unable to do so. The Working Group was also unable to meet with foreign fighters detained by the Government of Ukraine.

31. In response to its request to meet foreign detainees, the Working Group was informed by the Security Service of Ukraine that as part of the provisions of the Minsk Protocol, many prisoner exchanges had taken place between the two parties and there was no one available to meet with the delegation. The Working Group also notes that it is generally very difficult to meet with detainees under the control of the self-proclaimed "Donetsk people's republic" and it was informed by representatives of the latter that there were no foreign fighter detainees in custody when the representatives met with the visiting delegation.

32. While the Working Group did not visit the Autonomous Republic of Crimea, it received reports, including from civil society actors, that the events there in March 2014 were conducted by combined forces comprising regular Russian Federation troops, alleged mercenaries recruited from traditional Cossack paramilitary fighters, and general volunteers.

## V. Motivational factors

33. The motivations of foreigners joining the armed conflict in Ukraine reportedly vary. Regular career military persons represented a significant number of the participants. The Working Group was told that many were inspired to fight for ideological or political reasons, and others for financial compensation. In addition, some foreigners were from a criminal background, and information shared also indicates that some convicts in the Russian Federation were offered the option of imprisonment or serving in the conflict.

34. The Working Group received data that foreign women have also been among the combatants in the armed conflict, although in much smaller numbers. For example, they numbered 3 out of the 176 foreign fighters identified by Ukrainian authorities as fighting in the east.

35. Of the 176 foreign fighters identified, Ukrainian authorities estimate that some 70 per cent were motivated primarily by financial gains, and the remaining 30 per cent by a combination of both financial and political reasons, including as members of their respective country's rightist or leftist organizations.

36. In particular, it is alleged that those who were politically motivated were strongly influenced by propaganda. Others, such as those from Spain, were reminded of when the Union of Soviet Socialist Republics took part in the Spanish Civil War and were asked to pay back that historical debt. Yet others, such as the Chechens, reportedly undertook a proxy war of sorts, fighting on both sides of the conflict.

37. There was no information on foreign fighters joining battalions in Ukraine solely for compensation, and volunteers were largely deemed to be fighting for ideological reasons.

38. However, it was reported that some local people had joined the armed groups because there were limited alternatives for earning an income. Many former miners and factory workers joined the combat as more and more factories closed.

39. At the beginning of the hostilities, the conflict was allegedly also known as the "holiday war", as a way to earn money and have fun, and fighters were known as "vacationists".

40. Reportedly, fighters may also be awarded a diploma from the self-proclaimed "Donetsk people's republic" for bringing order to the "republic". They may also be awarded a medal for heroic acts.

41. While salaries were reported to be ad hoc in the early period of the conflict, it was learned that structured salaries had come into existence after some months, around October 2014 when "armed forces of the republics" were being established in certain districts of Donetsk and Luhansk regions, for example under the auspices of the "ministry of defence" of the self-proclaimed "Donetsk people's republic". Salaries were in the range of $300 to $500 per month, depending on rank, unit and duties. Reports indicate that company commanders may be paid $477 per month, commanders of small units $439 per month and privates $419 per month.

42. Alleged mercenaries were reportedly paid higher salaries and formed closed, separate units. They were reportedly more highly skilled, including as snipers.

43. The Working Group was told that some fighters, notably members of the Government's volunteer battalions, had purchased their own equipment, such as night goggles, uniforms and food, in order to join the fight. It was also reported that funding for volunteers had also been undertaken by ordinary citizens. However, funding for foreign fighters in the territories controlled by armed groups in the east had allegedly been largely attributed to financial support from the Russian Federation.

## VI. Recruitment

44. The Working Group learned that much of the recruitment of foreigners into various armed groups was undertaken through social media and other online communications, where information on the conflict as well as contact information for follow-up enlistment was readily available. Recruiting offices, allegedly including offices in the Russian Federation, allowed for face-to-face sharing of information and processing of recruits.

45. Broader recruitment was allegedly also undertaken through civil "patriotic" organizations in the Russian Federation, such as veterans' unions and so-called centres for the recruitment of volunteers.

46. Some armed groups also recruited through enlistment carried out by people who had already taken part in the conflict. It was reported that some fighters had returned home to look for recruits, drawing on youths and on other members of organizations that the fighters belonged to.

47. Recruitment for some armed groups may also involve receiving special training in military camps before deployment. This covers general military training, use and operation of weapons, sniper training, use of mines and explosives, and the organization of protests and riots. The period of training may vary, from five days up to three months, and the training culminates in the awarding of a military certificate. It is alleged that there are more than 100 training camps in the self-proclaimed "Donetsk people's republic" and the self-proclaimed "Luhansk people's republic", some 29 in the Autonomous Republic of Crimea, and 50 in the Russian Federation. Once recruited, foreign fighters may be given false documents and placed on the front line or be made members of reconnaissance, diversion or intelligence groups.

48. The usual entry to Ukraine for foreign fighters supporting the self-proclaimed "Donetsk people's republic" and the self-proclaimed "Luhansk people's republic" is reportedly through the 400-km section of the border between the Russian Federation and Ukraine that is controlled by the armed groups. Over the course of the conflict, authorities have noted that some 5,000 young persons have been observed entering at these borders, most of them wearing military-style clothing and backpacks. According to OSCE, men and women in military-style clothing have continued to cross the border daily between Donetsk region (controlled entirely by the armed groups) and the Russian Federation.[5]

49. It is also reported that training of the Ukrainian armed forces is undertaken by military officials of armed forces who have come from abroad, as well as by mercenaries serving as training instructors.

## VII. Legislation and measures relating to mercenarism and foreign fighters

50. A series of legislative changes related to mercenarism and foreign fighters were implemented after the conflict began. On 17 March 2015, Parliament drafted Law No. 2389 to allow foreigners to join the Armed Forces of Ukraine. Further amendments were made to the Criminal Code of Ukraine and to the Law on Military Service. Article 447 of the Criminal Code criminalizing mercenarism was amended to align the definition of "mercenary" with that in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. The crime of mercenarism is punishable by a term of imprisonment of between 5 and 10 years. The Working Group commends the Government for this initiative.

51. On 6 October 2015, the Parliament of Ukraine adopted the Law on Amending Certain Legislative Acts of Ukraine regarding Foreigners and Stateless Persons Serving in the Armed Forces of Ukraine. The Working Group was informed that the reason for the adoption of the law, as given in the explanatory note to the draft law, was that up to 1,000 foreign fighters were taking part in the armed conflict in eastern Ukraine on the side of the government forces. Their legal status up to that point had been unclear, as the legislation of Ukraine had neither explicitly prohibited, nor allowed for, military service by foreigners and stateless persons in the Ukrainian armed forces. The Working Group was also informed that the law replicated a very similar law adopted in the Russian Federation in 1998, and that such integration of foreign volunteers into the national armed forces was not prohibited in international law. A further justification given for the integration of foreign volunteers

[5] "Weekly update from the OSCE observer mission at Russian checkpoints Gukovo and Donetsk based on information as of 2 February 2016". Available from www.osce.org/om/220211.

was to avoid the risk of these individuals being recruited by wealthy individuals thus forming private armed groups outside of government oversight.

52. The law of 6 October 2015 amended a number of legislative acts in order to allow foreigners and stateless persons to serve in the Armed Forces of Ukraine at the rank of private, sergeant or sergeant-major, on a contract basis only. Such persons are entitled to the same level of remuneration as citizens of Ukraine serving at equal rank on a contract basis, except that their military service does not count towards their pension insurance record as it does for citizens of Ukraine. Foreigners and stateless persons become eligible to serve in the Armed Forces of Ukraine at officer rank only after gaining citizenship of Ukraine.

53. The following legislative acts were amended by the law of 6 October 2015:

- Law on Legal Status of Foreigners and Stateless Persons: Provides that foreigners and stateless persons who undergo contract military service in the Armed Forces of Ukraine are deemed to have lawfully temporarily resided in the territory of Ukraine for the duration of such contract. Their temporary residence may be confirmed by their military service record book.
- Law on Immigration: Adds an additional category for immigration, with the quota to be defined by the Cabinet of Ministers of Ukraine — people who have served in the Armed Forces of Ukraine for three or more years.
- Criminal Code of Ukraine: Brings the definition of "mercenary" into line with a conventional meaning.
- Law on the Internal Service Regulations of the Armed Forces of Ukraine: Adds the text of a military oath to be taken by foreigners and stateless persons admitted to serve with the Armed Forces of Ukraine; adds that foreigners and stateless persons admitted to serve in the Armed Forces of Ukraine shall take the military oath alongside citizens of Ukraine undergoing military service.
- Law on General Military Duty and Military Service: Provides that foreigners and stateless persons who are legally on the territory of Ukraine and match the following criteria: (a) are below 45 years old; (b) have no health constraints; (c) have undergone professional and psychological selection; and (d) have the necessary level of physical aptitude; can undergo military service at the rank of private, sergeant or sergeant-major, on a contract basis only. They shall be entitled to the same level of remuneration as citizens of Ukraine serving at equal rank on a contract basis. Foreigners and stateless persons become eligible to serve in the Armed Forces of Ukraine at officer rank only after gaining citizenship of Ukraine. The General Staff of the Armed Forces of Ukraine shall define which positions in the Armed Forces of Ukraine cannot be occupied by foreigners and stateless persons.
- Law on Social and Legal Protection of Military Servicemen and their Family Members: Clarifies that the period of military service of foreigners and stateless persons in the Armed Forces of Ukraine does not count towards their pension and insurance record.
- Law on the Armed Forces of Ukraine: Provides that foreigners and stateless persons who, according to the law, are enlisted in the Armed Forces of Ukraine for the first time shall officially commit to following the Constitution and the laws of Ukraine and fulfilling their military duties. Military servicemen when on duty shall wear the military uniform.

54. By April 2015, all volunteer battalions had been incorporated into either the Armed Forces of Ukraine or the Ministry of the Interior (National Police and National Guard of Ukraine). Only two armed formations had reportedly not been incorporated, namely the Voluntary Ukrainian Corps "Right Sector" (Dobrovolchyi Ukraiinskyi Korpus "Pravyi Sektor") and Organization of Ukrainian Nationalists battalions. The Working Group was informed that the incorporations had taken place on an individual basis rather than on a battalion basis.

55. On 24 December 2015, Parliament amended the Law on the National Guard of Ukraine, envisaging the possibility for foreigners and stateless persons to serve in the National Guard of Ukraine. It reads, in the relevant part, that "in circumstances envisaged by the Law of Ukraine on General Military Duty and Military Service, foreigners and stateless persons who lawfully reside in the territory of Ukraine may, on a voluntary basis (on contract), undertake military service with the National Guard of Ukraine". However, the Working Group was informed that the formal procedures to implement the new law on foreign volunteers were still being developed.

56. Decree No. 501/2015 of the President of Ukraine, dated 25 August 2015, on the National Human Rights Strategy of Ukraine, identified ensuring the right to life as a strategic area of focus, and stipulated the State's duty to protect human life in view of current circumstances. The Decree identified as being of particular concern, inter alia, "violation of the right to life due to illegal actions of the terrorist organizations 'Donetsk people's republic' and 'Luhansk people's republic', fighters, mercenaries..."

## Challenges in identifying and proving mercenarism

57. The distinction between mercenaries and foreign fighters is important in clarifying the situation of foreign armed actors in Ukraine. However, during the visit, the Working Group was unable to gather substantial and concrete data on the profile of fighters who had travelled from abroad to join the conflict, making it difficult to develop a comprehensive picture of the activities of foreigners fighting in the various armed formations.

58. Interlocutors informed the Working Group that although there was strong conviction regarding the presence of mercenaries in the armed conflict, the absence of first-hand information in relation to the specifically defined criteria to denote a mercenary made it difficult to state conclusively whether certain armed actors were mercenaries or simply foreign fighters. Moreover, there were other challenges, which included difficulty in proving the crime of mercenarism. The profit-gaining criterion was often the most difficult to establish, due to the lack of precise information on the income level of members of the armed groups.

59. Despite the lack of concrete data, the Working Group believes that the information it received points to several levels of foreigner engagement. These vary from volunteers to paid servicemen and servicewomen, and from independent militia members to professional members of the military.

60. According to the Security Service of Ukraine, the majority of fighters who were coming in to join the conflict in the east were from the Russian Federation, while small numbers were from other countries. A list of countries with nationals engaged in the hostilities in the east showed fighters from Afghanistan, Armenia, Azerbaijan, Belarus, Belgium, Brazil, Bulgaria, Colombia, the Czech Republic, Estonia, France, Georgia, Germany, India, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Poland, the Republic of Moldova, Serbia, Slovakia, Spain, the United States of America and Uzbekistan. It was not clear to the Working Group, however, whether some of these individuals were of Ukrainian origin or part of the diaspora and were returning to participate in the conflict.

61. The Security Service of Ukraine informed the Working Group that most of these fighters from abroad were recruited to operate on the front line and that mercenaries participated in the hostilities in the Mariupol area and in the taking over of Donetsk airport. These alleged mercenaries included former military men as well as a union of veterans, Cossacks and others, who were reportedly associated with the Russian Federation.

62. Camps and training bases located in Donetsk and other parts of the Donetsk region have reportedly been used to facilitate military training, including on the use of snipers, mines and explosives, the organization of protests and mass riots, and related activities. Usually, it is reported that the training lasts three months. Government authorities highlighted the ease with which fighters, ammunition and even fleets of tanks could pass across the border from the neighbouring Russian Federation into Ukraine. Only two border posts between the Russian Federation and Ukraine in Donetsk region were actively monitored by OSCE. However, inspections of the passengers being transported are not permitted, thus restricting the opportunity to gather information on the profile of individuals crossing the borders.

63. Although it received allegations of the recruitment of mercenaries, carried out in particular by the armed groups, the Working Group was not informed of anyone being convicted of mercenarism under the new law. Challenges in obtaining evidence and gathering information concerning alleged mercenaries, particularly in the area controlled by the armed groups in the east, further complicates the judicial proceedings on mercenarism. However, the Working Group learned that ongoing investigations were being carried out by specialized bodies into — among other things — mercenarism, and that no one had yet been indicted and brought to court.

64. In some court cases, there has been mention of "mercenaries" taking part in the armed conflict in eastern Ukraine. For example, the Working Group learned that on 23 December 2015, Poltava District Court, in Poltava region, having heard the criminal case against a Poltava resident for his alleged affiliation with the armed groups, established that one of the members of the armed groups was communicating with the commander of the "Don" battalion of the "Donetsk people's republic", which was allegedly composed of mercenaries from Chechnya and Serbia. The Working Group was informed that on 9 November 2015, the Security Service of Ukraine had reported on the detention of a citizen of the Russian Federation in the government-controlled town of Artemivsk (currently Bakhmut, Donetsk region). The detainee reportedly came from the Ryazan region in the Russian Federation and crossed the border into Ukraine illegally in order to join armed groups of the self-proclaimed "Donetsk people's republic" as a mercenary.

65. Reports received by the Working Group also indicate that on 26 September 2015, the Security Service of Ukraine described a resident of the Donetsk region as being a "mercenary" with the armed groups of the self-proclaimed "Donetsk people's republic", who was sentenced to five years of imprisonment under article 110 of the Criminal Code for trespassing against the territorial integrity of Ukraine. Reportedly, the convicted individual had joined the armed groups in order to earn a profit from carrying out military assignments, and had been promised monetary compensation of Hrv 800 per day. Investigators on the case apparently established that this individual had come through an area in Donetsk region controlled by the armed groups and had been detained in the town of Sviatohirsk (Donetsk region).

66. The Working Group notes that the Government of Ukraine has framed the conflict in the east as largely a problem of terrorism, and its response is mostly executed as part of its anti-terrorism operation. Other charges that have commonly been applied by the authorities against foreign fighters in the custody of the Ukrainian authorities have been brought under articles 110 (trespassing against territorial integrity) and 260 (creation of unlawful paramilitary or armed formations) of the Criminal Code.

67. The Working Group also received information concerning allegations of mercenarism made by representatives of the self-proclaimed "Donetsk people's republic". On 25 January 2016, the so-called "ministry of defence" of the self-proclaimed "Donetsk people's republic" claimed that the presence of foreign mercenaries, who had come to render assistance to the Ukrainian Government forces in the village of Shyrokyne, was a serious concern. Reportedly there were citizens of Poland and Turkey among this group. There were allegations of abduction of women in Mariupol and adjacent residential areas that reportedly took place at the hands of these fighters. Representatives of the self-proclaimed "Donetsk people's republic" also raised concerns in relation to members of the Azov battalion which, according to information received, actively participated in fighting in eastern Ukraine. The group reportedly included fighters from France, Italy, Sweden and the United Kingdom of Great Britain and Northern Ireland and is now integrated into the National Guard of Ukraine.

68. Other information received by the delegation identified Georgians of the alleged "Georgian national legion", which consists of former officers of the Georgian military who took part in the Georgian-Abkhaz conflict of the early 1990s. These men reportedly participate in fighting for battalions such as Kyivska Rus, Donbas, Aidar and Azov, which support the Government.

### Prosecution of foreign fighters in home countries

69. The Working Group was informed that, in response to the activity of foreign fighters in the armed conflict, some countries were introducing specific amendments to their laws, including the criminalization of mercenarism, to deal with fighters who had travelled to fight in Ukraine. There are reports that the Spanish authorities arrested Spanish citizens in six locations in Ukraine, charging them with murder and illegal arms transfer. The Working Group learned of one Estonian fighter who had allegedly been extradited.

70. Furthermore, on 27 April 2015, a court in Kazakhstan sentenced a 27-year-old Kazakh citizen for illegal participation in the armed conflict in eastern Ukraine, under article 172 (intentional unlawful participation of a citizen of the Republic of Kazakhstan in the armed conflict or hostilities on the territory of a foreign state without attributes of mercenarism) of the Criminal Code of Kazakhstan. The court has reportedly sentenced him to three years of imprisonment.

71. Additionally, on 7 August 2015, another citizen of Kazakhstan was reportedly sentenced to three years' probation for taking part in the armed conflict in eastern Ukraine, also under article 172 of the Criminal Code. The convicted individual reportedly participated in the "defence" of Luhansk airport. He was wounded shortly afterwards and sent to a Donetsk hospital for treatment. Later he returned home, to Ust-Kamenogorsk, where he was reportedly detained by the authorities.

## VIII. Human rights issues

72. At the time of the Working Group's visit, civilians continued to be killed, unlawfully detained, tortured and disappeared in eastern Ukraine and violations of the ceasefire agreement under the Minsk Protocol continued.[6] The presence of a large quantity

[6] OHCHR report on the human rights situation in Ukraine covering the period from 16 November 2015 to 15 February 2016. Available from www.ohchr.org/EN/Countries/ENACARegion/Pages/UAReports.aspx.

of sophisticated weaponry and significant flows of foreign fighters from the Russian Federation were reported by the human rights monitoring mission in Ukraine as having implications for the human rights situation in eastern Ukraine. Those living within the conflict-affected area were at the gravest risk of violations, including loss of life.

73. On 5 June 2015, the Government of Ukraine notified the Secretary-General of the United Nations of its derogation from certain obligations under the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, based on a declaration of the Parliament of Ukraine.[7]

74. It was stated in the notification that due to the annexation and temporary occupation by the Russian Federation of the Autonomous Republic of Crimea and the city of Sevastopol as a result of armed aggression against Ukraine, the Russian Federation was fully responsible for respect of human rights and implementation of the relevant treaties in the annexed and temporarily occupied territory of Ukraine.

75. Ukraine undertook to exercise the right of derogation in certain areas of the Donetsk and Luhansk regions of Ukraine that had been determined by the Anti-Terrorist Centre of the Security Service of Ukraine in connection with the anti-terrorist operation launched in April 2014. The derogation applies to articles 2 (3) and 9, 12, 14 and 17 of the International Covenant on Civil and Political Rights and to articles 5, 6, 8 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. This measure is to last until the "complete cessation of the Russian Federation armed aggression", the restoration of constitutional order, and until further notification to the Secretary-General of the United Nations and the Secretary-General of the Council of Europe of the resumption of the application in full of the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms.

76. The derogation was prompted by the adoption of laws diminishing some internationally protected rights and guarantees in order to respond to an "armed aggression". These include the following:

- On 12 August 2014, Parliament adopted the Law of Ukraine on Amendments to the Law of Ukraine on Combating Terrorism regarding the preventive detention of persons involved in terrorist activities in an anti-terrorist operation area for a period exceeding 72 hours.
- On 12 August 2014, Parliament adopted the Law of Ukraine on Amendments to the Criminal Procedure Code of Ukraine regarding the special regime of pretrial investigation under martial law, in a state of emergency or in an anti-terrorist operation area.
- On 12 August 2014, Parliament adopted the Law of Ukraine on Administering Justice and Conducting Criminal Proceedings in connection with an Anti-Terrorist Operation. On 3 February 2015, Parliament adopted the Law of Ukraine on Military and Civil Administrations. In accordance with the latter law, military and civil administrations were established as temporary State bodies functioning in the Donetsk and Luhansk regions, within the Anti-Terrorist Centre of the Security Service of Ukraine. They were granted powers to set limits on freedom of movement (curfew) and to conduct security searches, checks and other public safety measures.

[7] See the full derogation, available from https://treaties.un.org/doc/Publication/CN/2015/CN.416.2015-Eng.pdf (accessed 24 March 2016).

77. An additional notification of 27 November 2015 provided a list of localities in the Donetsk and Luhansk regions to which the derogation applied. All of these localities were under the partial or total control of the Government of Ukraine as at 1 October 2015. The derogation also reiterated that the Russian Federation was occupying and exercising effective control over certain areas of the Donetsk and Luhansk regions and that it was fully responsible for the respect and protection of human rights in those territories, under international humanitarian law and international human rights law.[3]

78. The Working Group urges the Government of Ukraine to reconsider the derogations with a view to assuming responsibility for the protection of the rights of the citizens of Ukraine. It reiterates the call by the human rights monitoring mission in Ukraine for the Government to take all possible measures to enhance protection for the population of Donetsk and Luhansk regions, including in areas under the control of the armed groups, as well as for those living in the Autonomous Republic of Crimea.

## IX. Human rights violations and impunity

79. Ukraine continues to face enormous challenges in the respect, protection and fulfilment of human rights, as armed conflict in the country persists. As highlighted in the OHCHR report covering the period from 16 February to 15 May 2016,[4] despite the reduction in hostilities, the conflict in the east still affects people residing in the conflict zone and their enjoyment of human rights. The threat of re-escalation of hostilities remains, which gives rise to further concern about human rights violations, particularly as ceasefire violations are not always observed. The reported inflow of ammunition, weaponry and fighters from the Russian Federation to the territories controlled by armed groups further destabilizes the situation in the east and for the local population.

80. What has been a serious concern for the Working Group is the widespread impunity for gross violations that have taken place at the hands of foreign armed actors, allegedly on both sides of the conflict. To date, foreign fighters have been prosecuted by the Ukrainian authorities for various crimes including terrorist-related offences, but there have been no prosecutions in relation to human rights violations that have taken place.

81. The impact of the activities of foreign fighters on human rights, from actors on both sides of the conflict, includes alleged cases of extrajudicial and summary execution, torture, arbitrary detention, and infringement of the rights to freedom of movement and freedom of expression.

82. Concerns were expressed to the Working Group that the ad hoc development of battalions and armed groups, including those with foreigners in them, contributed to the absence of effective command and control of armed forces. This was identified as a factor in the escalation of hostilities and the expanded negative impact in terms of human rights violations, with large numbers of civilians among the victims.

83. The Working Group received reports of violations committed by the Aidar volunteer battalion in Luhansk region.[5] Among these were abductions, unlawful detentions, and acts of torture and ill-treatment, including of detainees, robberies, and possible executions, potentially amounting to war crimes. It is alleged that the volunteers abducted local men deemed to be collaborating with armed groups and held them in detention, beat them and

[3] See https://treaties.un.org/doc/Publication/CN/2015/CN.656.2015-Eng.pdf (accessed 24 March 2016).

[5] "Ukraine: abuses and war crimes by the Aidar volunteer battalion in the north Luhansk region", Amnesty International briefing, 8 September 2014, index number: EUR 50/040/2014. Available from https://www.amnesty.org/en/documents/EUR50/040/2014/en.

robbed them of their valuables. The Working Group was informed that there had been an investigation by the Office of the Military Prosecutor into the allegations against members of the Aidar battalion. Eleven members of the battalion had been indicted for intentional homicide or for illegal abduction or confinement of a person, and two other members were detained on 13 April 2016.

84. Despite the efforts by the Office of the Military Prosecutor in bringing perpetrators from volunteer battalions and the Armed Forces of Ukraine to justice, the level of impunity remains high. This is indeed the core preoccupation of the Working Group in relation to the visit. Impunity for the human rights violations committed by the range of foreigners in armed formations is widespread and seemingly unquestioned, paving the way for a murky zone with negligible accountability. The Working Group learned that there had never been any prosecutions for the specific crime of mercenarism in Ukraine. Additionally, some foreign fighters have been charged for indirect offences such as trespassing against the territorial integrity of Ukraine, participation in a terrorist group or organization, and participation in unlawful paramilitary or armed formations, with 97 citizens of the Russian Federation reportedly charged and three reportedly sentenced for related offences but not for the human rights violations committed.

85. The Working Group is also concerned about the consequences of the conflict and the activities of foreign fighters and mercenaries as regards economic, social and cultural rights. The delegation learned of difficulties with access to water and gas among civilians affected by the conflict in the east. Also, 1.8 million people[10] have been internally displaced within Ukraine due to the conflict, with some gradually returning to their homes in the areas controlled by the armed groups. Access to housing, land and property continues to be a major problem. Between November 2015 and February 2016, the human rights monitoring mission in Ukraine compiled information about hostilities and the mass looting of civilian homes instigated by Ukrainian armed forces in the village of Shyrokyne (23 km to the east of Mariupol). To date, the residents displaced have received very little information about the status of their homes.

86. Regarding freedom of movement, the delegation witnessed long queues at checkpoints to enter and leave Donetsk, which were working on the basis of procedures established by the relevant authorities. These delays were also brought about in part by the cessation of trade between Ukraine and the territories in the east under the control of the armed groups, as well as by the need for individuals to go to areas outside of the contact line to collect social benefits or simply to visit friends and relatives. The State Border Service recorded as many as 25,000 to 27,000 civilians crossing the contact line on a daily basis, passing through five transport corridors (as of May 2016): four in Donetsk region and one in Luhansk region, which have stretches of "no man's land" in between. Often, between 300 and 400 vehicles wait in the queue for miles on each side of the contact line, resulting in passengers spending nights in freezing temperatures without access to water or sanitation as they wait to pass to the other side of the conflict zone.

87. In addition, the Working Group learned that many non-governmental organizations, particularly in the east, and those critical of the actions of the Government and other actors in the conflict, had been forced to shut down or their members had been arrested or intimidated. Only one or two organizations were thus operational in the region at the time of the visit, for the purpose of undertaking humanitarian work.

[10] According to the Ministry of Social Policy of Ukraine, the number of registered internally displaced persons from the conflict-affected areas and the Autonomous Republic of Crimea reached 1,785,740 as at 6 June 2016.

88. The Working Group encourages consideration by the Government and all parties to the conflict of the full range of human rights impacts of the activities of foreign armed actors, with a view to preventing and addressing violations. Particular attention may be paid to negotiation between the two sides on ensuring the protection of human rights, notably for civilians.

## X. Private military and security companies

89. The Working Group did not find significant data on private military companies. It was informed by government authorities that only private security companies operated in the country, not private military companies, and that the Ministry of Interior oversaw their activities. On another matter, only State security companies allowed for personnel to be armed.

90. A licensing regime regulates private security companies, and if there are any violations the licence is revoked, with criminal cases opened in respect of any crime committed. However, the operation of private military companies is currently prohibited.

91. The Working Group was informed of a Russian private military company that reportedly recruited fighters, including foreigners, for the conflict in Ukraine. When asked about reports coming from the self-proclaimed "Donetsk people's republic" or the self-proclaimed "Luhansk people's republic" about foreign private military companies, the Working Group was informed by the Ukrainian authorities that there was no precise information on the issue.

92. The Working Group strongly recommends regulation of the private military sector in the interest of preventing potential human rights violations. In this regard, it is encouraged by the request by the Security Service of Ukraine to cooperate with the Working Group in developing legislation on the activities of private military companies. The Working Group stands ready to render its support to this endeavour.

## XI. Conclusions and recommendations

93. **At the time of the Working Group's visit, the human rights monitoring mission in Ukraine reported that between 16 November 2015 and 15 February 2016, 78 conflict-related civilian casualties in eastern Ukraine had been recorded. Although numbers of casualties have decreased from previous years, the threat to civilian lives remains, as continued inflows of weapons, fighters and heavy artillery provide resources and ammunition for the ongoing clashes along the contact line. Continued indiscriminate shelling and the presence of anti-personnel mines and explosive remnants of war expose civilians to constant threat of death or injury. Those who live in what is termed "no man's land" or the "grey zone", an area along the contact line, feel the most vulnerable to human rights violations. The contact line has physically, politically, socially and economically isolated civilians, impacting on all of their human rights.**

94. **The continued presence of foreign fighters with large numbers of heavy weapons and ammunition, facilitated by the ease of passage through the borders between Ukraine and the Russian Federation, continues to pose threats to any peaceful resolution to the conflict.**

95. **The Working Group urges the Government and all parties to the conflict to fulfil their obligations under international human rights law and ensure respect for all civil, political, economic, social and cultural rights related to the activities of foreigners in armed groups.**

96. **It recommends full implementation of the Minsk Protocol, particularly the immediate ceasefire provision, the release without delay of hostages and all persons unlawfully or arbitrarily detained, and the withdrawal of illegal and armed formations and military equipment, as well as of fighters and mercenaries from Ukraine.**

97. **The Working Group maintains that fulfilment of provision 7 of the Minsk Protocol, on the continuation of inclusive national dialogue, is fundamental to achieving sustained peace and security and eliminating the market for mercenaries as well as the human rights violations related to their activity and the activities of other foreign fighters.**

98. **The Working Group urges the Government and all parties to the conflict to refrain from indiscriminate shelling of populated areas, where civilians are at grave risks of death and injuries.**

99. **In moving forward towards full accountability for human rights violations by foreigners in armed groups in Ukraine, the Working Group urges advancing beyond recognition of the role of foreign combatants in the armed conflict, to addressing their impact. Concrete measures for monitoring, reporting, legislation and legal action will mean incremental achievement of justice for victims of violations, and erosion of the harmful culture of impunity for acts committed during the armed conflict.**

100. **To address the problem of impunity, investigation, prosecution and judicial proceedings should be further carried out against persons responsible for serious violations or abuses of international human rights law or international humanitarian law, including torture or other cruel, inhumane or degrading treatment or punishment, summary or arbitrary executions, or enforced or involuntary disappearances. Alleged mercenaries should be tried and convicted in accordance with article 447 of the Criminal Code of Ukraine.**

101. **The Working Group encourages enhanced mutual legal assistance regimes and extradition agreements with the countries of origin of the foreign fighters, to facilitate a greater exchange of evidence and information in order to better secure convictions for crimes committed in Ukraine.**

102. **Particular attention should be paid to effective border control, including at the border between the Russian Federation and Ukraine, and to monitoring the movement of armed personnel.**